FILED

961447 MAR 12 1997

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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Petitioner,

v.

BE&K CONSTRUCTION COMPANY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR A WRIT OF CERTIORARI

JOHN T. DE CARLO
DANIEL J. HALL
DE CARLO, CONNOR & SELVO
500 South Virgil Avenue
Los Angeles, CA 90020

ANDREW D. ROTH
DAVID M. SILBERMAN
LAURENCE GOLD *
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

37 pp

QUESTIONS PRESENTED

International Shoe Co. v. Washington, 326 U.S. 310 (1945), and its progeny, have recognized as consistent with the Due Process Clause, two heads of *in personam* jurisdiction over legal entities whose "personality is a fiction" and whose "presence" in the forum State can be "manifested only by activities carried on in [the entity's] behalf."

The Due Process Clause "*specific* jurisdiction" law is well settled. But the state appellate courts and the federal courts of appeals are divided as to when the Due Process Clause permits the exercise of "*general* jurisdiction"—*viz.*, *in personam* jurisdiction over a corporation or unincorporated association in a suit *not* arising out of or related to the entity's contacts with the forum.

The Supreme Court of Alabama, for its part, holds that in any suit by a resident plaintiff, Alabama can, consistent with the Due Process Clause, assert general jurisdiction over any corporation and any unincorporated association "conduct[ing] business here," *viz.*, any legal entity that engages in some activity within the State on an ongoing, as opposed to sporadic, basis.

The questions presented are:

1. Does the Due Process Clause permit a State to assert general jurisdiction—and thus to adjudicate claims against the defendant not arising out of or related to the defendant's in-State activity—over any corporation and any unincorporated association that engages in some ongoing activity within the State and without regard to the nature, volume, or extent of the entity's in-State activity?

2. If not, does the Due Process Clause require, for the constitutional assertion by a State of general jurisdiction (i) that (as the cases discussed *infra* at pp. 16-17, hold) the defendant engage in substantial activity within the State in absolute terms; (ii) that

(as the cases discussed *infra* at pp. 18-19, 20-21, hold) a substantial proportion of the defendant's overall activities take place within the State; (iii) that (as the cases discussed *infra* at pp. 22-23, hold) the defendant's general business activities in managing and directing the enterprise as a whole take place within the State; or (iv) that (as the case discussed *infra* at pp. 23-25, holds) the defendant's activities within the State meet a basic "minimum contacts" test and the assertion of general jurisdiction satisfies a five-factor "reasonableness" test?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption—the United Brotherhood of Carpenters and Joiners of America, AFL-CIO and BE&K Construction Company—the following were parties in the courts below:

United Paperworkers International Union, AFL-CIO;

Minnesota State Building and Construction Trades Council;

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 728;

International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 783;

International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 8;

William P. Lukawski, Jr.;

Rudolph H. Clay;

Marc J. Furman; and

William R. Peterson.

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PETITION FOR A WRIT OF CERTIORARI

The United Brotherhood of Carpenters and Joiners of America, AFL-CIO, petitions this Court to issue a writ of certiorari to the Supreme Court of Alabama to enable this Court to review the judgment and decision in *Ex parte United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, S. Ct. of Ala. No. 1915080.

OPINIONS BELOW

The decision of the Supreme Court of Alabama has not yet been reported, and is reproduced as Appendix A in the separately-bound appendix to this *certiorari* petition (Pet. App. 1a-21a). The decision of the Circuit Court of Jefferson County, Alabama is unreported, and is reproduced as Appendix B hereto (Pet. App. 22a).

JURISDICTION

The Supreme Court of Alabama issued its decision on January 10, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

BE&K Construction Company ("BE&K") commenced this action against the United Brotherhood of Carpenters and Joiners of America, AFL-CIO ("UBC"), and others, in the Alabama state court in Jefferson County, Alabama, alleging assault, trespass and civil conspiracy.

The gravamen of BE&K's complaint, as stated by the Supreme Court of Alabama, is that the UBC and several other defendants engaged in a "campaign . . . to prevent BE&K"—which is a "nonunion contractor"—from "performing labor contracts in two paper and pulp mills, located in Minnesota and Oregon, respectively." Pet. App. 1a-2a. In its complaint, BE&K "sought compensation for damage resulting from acts of vandalism and violence it alleged union employees had committed over the course of . . . this campaign" in Minnesota and Oregon. Pet. App. 2a.

The UBC is an international labor organization that is headquartered in Washington, D.C., and that maintains eight "district offices" in the United States. The UBC maintains no district or other office in Alabama, owns no property in Alabama, and has no bank accounts or investments in Alabama. Accordingly, BE&K served process on the UBC in the instant case by mail at the UBC's Washington, D.C. headquarters.

There are local unions, district councils and state councils (collectively "locals") affiliated with the UBC throughout the United States. Each local is a legally separate entity which adopts its own constitution, elects its own officers, maintains its own treasury, and conducts its own affairs. Individual workers become members of the UBC by joining a local in the area where the individual is employed; members thereafter pay dues to their local to maintain their good standing. The local, in turn, pays a monthly "per capita tax" to the UBC based on the number of members in good standing in the local.

When BE&K's lawsuit was filed, 10 of the 1,265 locals affiliated with the UBC were located in Alabama. Those locals accounted for 2,485 of the 495,000 members of the UBC, and for $198,022 of the $39,500,000 in per capita payments to the UBC. In percentage terms, then, less than one percent of those locals were based in Alabama, and only one half of one percent (.5%) of the members and of the UBC's income were attributable to Alabama.

At the time this suit began, the UBC had 355 employees nationwide including 77 regional staff representatives. One UBC staff representative resided in Alabama and performed normal union staff representative functions throughout the Southern region of the country.

In accordance with Alabama procedure, the UBC appeared and moved to dismiss the complaint on the ground that the exercise of personal jurisdiction over the UBC in Alabama with respect to claims resting on events that had transpired in Minnesota and Oregon would contravene the Due Process Clause of the Fourteenth Amendment. On the facts just outlined, the trial court denied the motion. Pet. App. 22a.

The Supreme Court of Alabama, on a petition for writ of mandamus, then rejected the UBC's federal constitutional claim and held, in agreement with the trial court, that the UBC was amenable to suit in the Alabama courts on *any* cause of action arising out of the UBC's activities

in *any* forum (or, in other words, that the Alabama courts could constitutionally exercise what has come to be known as "general jurisdiction" over the UBC). Pet. App. 1a-13a.

In so holding, the Alabama Supreme Court, while acknowledging that "the Due Process Clause of the 14th Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant," Pet. App. 8a, nonetheless concluded (i) that the above-enumerated UBC contacts with Alabama were "systematic and continuous enough to justify the imposition of a state's general jurisdiction over a foreign defendant," *id.* at 9a, and (ii) that BE&K's status as an Alabama resident corporation that had elected to file suit in the Alabama court was sufficient to satisfy the "considerations of fair play and substantial justice" implicated by the Due Process Clause, *id.*

Justice Butts of the Alabama Supreme Court dissented, stating:

> The Boise Cascade jobsite and areas surrounding International Falls, Minnesota, stand at the center of this lawsuit. That is the place where the vast majority of acts were alleged to have been committed, where critical witnesses to these acts reside, and where the community has spent years debating and absorbing the turbulence of this bitter labor dispute. In contrast, none of the acts complained of occurred in Alabama, the burden of bringing key witnesses to Alabama is an onerous one, and the Alabama citizenry has had little exposure to or impact from the acts at issue. . . . The structure of the Due Process Clause forbids a state court to exercise personal jurisdiction over a foreign defendant under circumstances that would offend "traditional notions of fair play and substantial justice." Because I believe such circumstances are present in this case, I would grant UBC's petition for the writ of mandamus and direct the trial court to enter an order dismissing BE&K's claims against UBC, without prejudice. [Pet. App. 21a.]

REASONS FOR GRANTING THE WRIT

The predicate for a judicial proceeding—and for a judicial system operating within the rule of law—is that the tribunal have the authority to adjudicate the claim brought by the plaintiff and to issue a valid judgment, *viz.*, that there be "jurisdiction." And, where the suit is brought against a legal entity—be it a corporation or an unincorporated association such as a labor union—and jurisdiction over the defendant is asserted *in personam*, the predicate for determining the constitutional limit on that assertion of jurisdiction is provided by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

International Shoe worked its revolution in this Due Process Clause inquiry just over a half century ago. But as the instant case shows, that revolution is only half fought.

International Shoe and its progeny are understood to have sanctioned, and delimited, *both* the assertion of *"specific jurisdiction"*—wherein a State may exercise personal jurisdiction over a defendant "in a suit *arising out of or related to* the defendant's contacts with the forum"—*and* the assertion of *"general jurisdiction"*—wherein a State may exercise personal jurisdiction over a defendant in any and all suits brought against that defendant, *including* "a suit *not* arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414 nn.8 & 9 (1984) (emphasis added).[1]

The "specific jurisdiction" law has long since become settled. In contrast, the "general jurisdiction" law sug-

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[1] Citing Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1136-44, 1144-64 (1966); Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S. Ct. Rev. 77, 80-81; *Calder v. Jones*, 465 U.S. 783, 786 (1984).

gested by *International Shoe*—and touched on in only two subsequent decisions, *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952) and *Helicopteros, supra*—has proved so evanescent as to defy consistent application. The result is a multiplicity of irreconcilable general jurisdiction standards and general jurisdiction decisions in the state appellate courts and the federal courts of appeals.

That conflict goes to the essence: the competing Due Process Clause standards are normally outcome determinative on the question of the forum's jurisdiction to hear, and to decide on the merits, the plaintiff's claim against the defendant. And, the choice of the Due Process Clause standard that determines the scope of general jurisdiction has the most profound consequences for the litigation system and for litigants.

If the Alabama Supreme Court's decision here is correct, the Due Process Clause permits each and every State to exercise general jurisdiction—which to repeat is "jurisdiction over a defendant in a suit *not* arising out of or related to the defendant's contacts with the forum"—over each and every suit by a resident plaintiff against each and every unincorporated association (including, but not limited to, labor unions) that has legally-separate affiliated organizations, and/or dues-paying members, in the State and that maintains normal associational relations with those local entities and/or members. And, the Alabama Supreme Court reached that decision on the strength of its earlier decisions holding that in such cases the Due Process Clause permits the States to exercise general jurisdiction over each and every corporation that sells or distributes its products in the State, whether through employees, legally-separate franchises, or legally-separate authorized dealers or agents.

In short, the Alabama Supreme Court's approach would allow *each and every* State to assert general jurisdiction over the greatest portion of the legal entities that are active in this Nation's economic and social life.

That expansion of general jurisdiction, we submit, is *not* rooted in this Court's cases and does *not* accord with the *International Shoe* requirement that the assertion of jurisdiction over corporations and other legal entities be "reasonable in the context of our federal system of government," 326 U.S. at 317, and "reasonable and just, according to our traditional conception of fair play and substantial justice," *id.* at 320.

To correct the Alabama Supreme Court's overreaching of its authority—and to bring order to what is now legal chaos—this Court should issue a writ of *certiorari* in this case.

1. For over a century, since *Pennoyer v. Neff*, 85 U.S. 714 (1878), this Court has recognized that the Due Process Clause places constitutional limits on the power of a state or federal court to decide cases and render judgments *in personam*.

Under *Pennoyer*, the defendant's physical "presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him." *International Shoe*, 326 U.S. at 316. But that formulation of the governing Due Process Clause rule proved particularly problematic with regard to defendants, like corporations and unincorporated associations, that are legal entities, not natural persons. As the *International Shoe* Court explained, "[s]ince the corporate personality is a fiction, . . . it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it." *Id.* That being so, to ask whether the "corporation is so far 'present' . . . as to satisfy due process requirements . . . is to beg the question to be decided," *id.*, and to imply "consent to service . . . from presence" is to "resort to [a] legal fiction," *id.* at 318.

Instead, the *International Shoe* Court held that the question of "[w]hether due process is satisfied must depend . . . upon the quality and nature of the activity [of the cor-

poration] in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." 326 U.S. at 319. The Court elaborated on this concept as follows:

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, *so far as those obligations arise out of or are connected with the activities within the state*, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. [*Id.* (emphasis added).]

And, *International Shoe* goes on to hold that the State of Washington was constitutionally permitted to exercise jurisdiction over the corporate defendant in an unemployment compensation action arising out of the defendant's employment of salesmen in Washington. The Court explained:

> [T]he activities carried on in behalf of appellant in the State of Washington . . . were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state . . . . *The obligation which is here sued upon arose out of those very activities.* It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit *the state to enforce the obligations which appellant has incurred there.* [326 U.S. at 320 (emphasis added).] [2]

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[2] Although *International Shoe* involved a corporation rather than, as in the instant case, an unincorporated association, the *International Shoe* analytical framework applies equally to both types of legal entities since, like the "corporate personality," the "personality" of an unincorporated association "is a fiction," and like cor-

International Shoe thus provides a solid doctrinal foundation for assessing the exercise of *specific jurisdiction* over a corporation or other legal entity. The Court has, moreover, decided a long line of such cases in the years since *International Shoe*.[8] The result is that this branch of the Due Process Clause law is clear as to the governing legal standard, its rationale, and the boundary points that mark its limits. And, as a consequence, the lower court specific jurisdiction decisions show admirable consistency both in reasoning and result.

Precisely the opposite is true with respect to the general jurisdiction doctrine. That doctrine can be traced back to a Delphic paragraph of *dictum* in *International Shoe* which reads as follows:

> While it has been held in cases on which appellant relies, that continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity, *Old Wayne Life Assn. v. McDonough*, [204 U.S. 8 (1907)]; *Green v. Chicago, B. & O. R. Co.*, [205 U.S. 530 (1907)]; *Simon v. Southern R. Co.*, [236 U.S. 115 (1915)]; *People's Tobacco Co. v. American Tobacco Co.*, [246 U.S. 79 (1918)]; *cf. Davis v. Farmers Co-operative Co.*, 262 U.S. 312, 317 [(1923)], there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities. *See Missouri, K. & T.R. Co. v. Reynolds*, 255 U.S.

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porations (and unlike individuals), an association's "presence . . . can be manifested only by activities carried on in its behalf by those who are authorized to act for it." 326 U.S. at 316. On this sole point, the lower courts are in unanimous agreement.

[8] *See, e.g., Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Calder v. Jones*, 465 U.S. 783 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

> 565 [(1921)]; *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 [(1917)]; *cf. St. Louis S.W.R. Co. v. Alexander*, [227 U.S. 218 (1913)]. [326 U.S. at 318.]

The *International Shoe* Court did not, in terms, endorse the cited cases in which "continuous corporate operations within a state were thought so substantial and of such a nature" as to justify the exercise of general jurisdiction over the corporation. And, it is very much to the point that those cases—rather than essaying an articulated theory of the "continuous corporate activities" that are "so substantial" and "of such a nature" as to support a broad *general* jurisdiction—attempted to justify such jurisdiction by reference to the very "corporate presence" analysis that *International Shoe* rejects as an untrustworthy guide to constitutional decisionmaking.

To be sure, six years after *International Shoe*, in *Perkins v. Benguet Consolidated Mining Co., supra*, the Court did squarely uphold the exercise of general jurisdiction. But in so doing the Court dealt with the case before it on its particular facts and in narrow, fact-specific terms.

In *Perkins*, suit was brought in the Ohio courts against a Philippine mining corporation. World War II had "completely halted" Benguet's Philippine mining operations and the company largely conducted its business out of Ohio, which was the home state of its president who was also its general manager and its principal stockholder. 342 U.S. at 447-48. During that period of time, the president-general manager "maintained an [Ohio] office," *id.* at 447, from which he "discharged his duties as president and general manager," and did so by "carry[ing] on . . . a continuous and systematic supervision of the necessarily limited wartime activities of the company" and by "direct-[ing] . . . many of the company's wartime activities," *id.* at 448.

After outlining the background law as stated in *International Shoe*, the *Perkins* Court framed the question be-

fore it as "whether . . . the business done in Ohio by the respondent was sufficiently substantial and of such a nature as to permit Ohio to entertain a cause of action . . . ar[ising] from activities entirely distinct from [respondent's] activities in Ohio." *Id.* at 447. Without offering any doctrinal elaboration, the Court "conclude[d] that, under the circumstances above recited, it would not violate federal due process for Ohio . . . to take . . . [general] jurisdiction of the corporation." *Id.*

This Court has issued only one general jurisdiction decision subsequent to *Perkins—Helicopteros Nacionales de Colombia, S.A. v. Hall, supra*—and that decision, like *Perkins*, is framed in fact-specific terms. There, suit was brought against a Colombian corporation which had operated a helicopter which had crashed in Peru, killing the plaintiffs' decedents. The Colombian corporation had purchased approximately 80% of its helicopter fleet (as well as spare parts and accessories) in Texas; the corporation's pilots were trained in Texas; and the corporation had negotiated a contract in Texas pursuant to which the corporation provided services, albeit outside of Texas, to a Texas-based joint venture. *See* 466 U.S. at 416-18. This Court, nonetheless, held that the Texas courts had erred by entertaining general jurisdiction over the corporation.

The *Helicopteros* Court posed the question to be answered as whether the defendant corporation's "contacts with the State of Texas . . . constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*." 466 U.S. at 416. After canvassing the "contacts" one by one—and after finding that those contacts standing alone, and in their totality, "are not enough to warrant a State's assertion of *in personam* [general] jurisdiction over a nonresident corporation"—the Court held that the assertion of such jurisdiction on such contacts did not "satisfy the requirements of the Due Process Clause." *Id.* at 418-19.

2. The "general jurisdiction" doctrine thus rests on the most fragile of decisional bases. As Justice Scalia noted in his plurality opinion in *Burnham v. Superior Court*, 495 U.S. 604 (1990), this Court's "only holding" supporting the doctrine is *Perkins* which "involved 'regular service of summons upon [the corporation's] president while he was in [the forum State] acting in that capacity.' " 495 U.S. at 610 n.1 (quoting *Perkins*, 342 U.S. at 440) (brackets in original).

Equally to the point, neither *Perkins*—nor any prior or subsequent decision—offers any justification in principle for the proposition that the Due Process Clause sanctions the exercise of general jurisdiction over a legal entity on the strength of in-State activities of the entity that are *not* the predicate of the plaintiff's claim. This case presents the Court with an opportunity to fill that void. And, grasping that opportunity would meet the most pressing of needs.

Very simply stated, this Court's three general jurisdiction precedents have not proved sufficient to guide the determination of when general jurisdiction is constitutionally permissible. *International Shoe* says only that "there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify" general jurisdiction. *Perkins* speaks in terms of business "sufficiently substantial and of such a nature" as to permit general jurisdiction. And, *Helicopteros* frames the inquiry as whether the corporation's "contacts" with the forum State "constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*."

These "tests" or "standards," if such they be, have proved in practice to be too indistinct to bring shape and order to the general jurisdiction law. The result, as we now show, is an ever-expanding list of state, and federal, appellate court decisions that quote from the same words in *International Shoe*, *Perkins* and *Helicopteros*,

but cannot be reconciled in their understanding of those words, in their reasoning, or in their ultimate Due Process Clause holdings.

A number of state appellate courts—and one federal court of appeals—understand this Court's cases to permit the exercise of general jurisdiction over any corporation and any unincorporated association that engages in activities on an ongoing—as opposed to a sporadic—basis in the forum State, without regard to the nature, volume, or extent of the entity's activities in that State.

Other state courts and federal courts of appeals require more than continuity and hold that general jurisdiction is proper only if the defendant corporation or unincorporated association conducts *substantial* activities in the forum State. Several of these courts go on to hold that substantiality is to be determined by considering the proportion of the defendant's overall activities transacted in the forum.

The Fifth and Ninth Circuits take yet a third approach—that general jurisdiction is proper only where, as in *Perkins*, an entity centers its "general business" activities—*viz.*, the activities entailed in managing and directing its affairs—in the forum State.

Finally, the Second Circuit has stated an entirely different test, one focusing on five "reasonableness" factors drawn from this Court's specific jurisdiction jurisprudence.

The decisions just noted—and reviewed in greater detail below—bear only a slight resemblance to the ordinary process of constitutional elaboration. In the main, each forum State has gone more or less its own way with minimum explication of its rule and even less recognition of the decisions of other forum States. Nonetheless, from the holdings—if not the reasoning—of the cases, the conflict, and confusion, is plain.

(a) The Alabama Supreme Court, along with a number of other state appellate courts, has staked out the most expansive view of the constitutional limits on general jurisdiction.

The leading Alabama case, on which the court below relied in the instant case, is *Ex parte Newco Mfg. Co.*, 481 So. 2d 867 (Ala. 1985). *See* Pet. App. 11a. *Newco* was a product liability suit against a Kansas City-based company which sold an allegedly defective product in Maryland. The Alabama Supreme Court, while acknowledging that the case "does not relate to or arise from Newco's contacts with Alabama," nonetheless held that Newco could be sued in Alabama for any wrong the company had committed anywhere because, over a six-year period, the company had "annual sales . . . rang[ing] from $65,000 to $85,000" in Alabama, with a "total of 2,000 transactions" in the State over those six years. *Id.* at 868. In the Alabama Supreme Court's view, these sales—although small in dollar amount and effected without any Alabama-based employees through "an independent manufacturer's representative or the telephone and mail services"—nonetheless established that the defendant was "engage[d] in that continuous and systematic course of conduct in Alabama . . . that will support a reasonable exercise of jurisdiction by the courts of Alabama." *Id.* at 869.

Since *Newco*, the Alabama Supreme Court has repeatedly upheld the exercise of general jurisdiction over corporations which engage in ongoing business in the State regardless of the amount of that business or the importance of the business to the defendant's overall operations.[4] In-

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[4] *See, e.g., Atlanta Auto Auction, Inc. v. G & G Sales, Inc.*, 512 So. 2d 1334 (Ala. 1987) (upholding general jurisdiction over a Georgia automobile auction services company that advertised its auctions in Alabama resulting, so far as the record showed, in "numerous" sales to a single Alabama customer); *Ex parte I.M.C., Inc.*, 485 So. 2d 724 (Ala. 1986) (the same result with respect to an Indiana corporation that, so far as the record showed, had made direct sales to a single customer in Alabama ranging from $2,339.48-$36,485.14 per year over a four-year period); *see also Ex parte British Steel Corp.*, 426 So. 2d 409 (Ala. 1982) (the fact that a British corporation sold steel in Alabama on a regular

deed, in the instant case, the Alabama Supreme Court understood *Newco* to stand for the proposition that where "nonresident defendants . . . initiate[] contact[] with the state solely for their own profit, availing themselves of the privileges of conducting business here . . . such activities [a]re sufficiently systematic and continuous to support a finding of general jurisdiction." Pet. App. 11a. And, on that basis, the Alabama Supreme Court sustained general jurisdiction here finding that the UBC's "collection of dues . . . is systematic and continuous." *Id.* at 12a.

The Alabama Supreme Court is not alone in this view. Decisions of the Alaska, Oklahoma, Washington, Michigan, Illinois and Mississippi courts—while far from a model of clarity—are to the same effect.[5] And, a line

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basis through a wholly-owned subsidiary incorporated in New York and headquartered in Texas was sufficient, standing alone, to warrant the exercise of general jurisdiction over the British corporation).

[5] *See Glover v. Western Air Lines, Inc.*, 745 P.2d 1365, 1368 (Alaska 1987) (general jurisdiction held to be proper over Avis Rent-A-Car System, Inc.—a Delaware corporation with its principal place of business in New York—based on record evidence showing that "in 1985 Avis U.S. collected $10,985.12 from a single local franchisee"); *Ferrell v. Prairie Int'l Trucks, Inc.*, No. 86-949, 1997 WL 33953, at *3 n.2 (Okla. Jan. 28, 1997) (holding that a Delaware corporation with its principal place of business in Illinois had "sufficient contacts [with Oklahoma] for the exercise of either specific or general jurisdiction" by virtue of the fact that the corporation advertised its products and services in Oklahoma and, so far as the record showed, maintained contractual relations with two Oklahoma residents); *Hartley v. American Contract Bridge League*, 812 P.2d 109 (Wash. Ct. App.), *review denied*, 820 P.2d 511 (Wash. 1991) (holding, in reliance on the decision of the Washington Supreme Court in *Crose v. Volkswagenwerk Antiengesellschaft*, 558 P.2d 764 (Wash. 1977), that general jurisdiction was proper over a non-profit Contract Bridge League incorporated in New York and headquartered in Tennessee, on the ground that the Bridge League conducted an unspecified number of its bridge tournaments in Washington, serviced its members who resided in Washington, and collected an unspecified amount of dues and fees

of New York Court of Appeals' decisions beginning with *Tauza v. Susquehanna Coal Co., supra,* have a similar ring to them, although in the latest case in that line the corporation's sales in New York were not only ongoing in nature but substantial in absolute dollar terms.[6]

(b) The California, Nevada, Wyoming, and Texas courts have parted company with the courts cited above by insisting that general jurisdiction cannot be established

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from those Washington members); *Michigan Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 465 (6th Cir. 1989) (surveying the Michigan state court cases on the issue of general jurisdiction, including one case in which general jurisdiction was upheld based entirely on evidence that the defendant corporation "had dozens of sales in Michigan throughout the year, which altogether totalled over $30,000"); *Maunder v. DeHavilland Aircraft*, 466 N.E.2d 217, 222 (Ill. 1984) (reaffirming, post-*Helicopteros*, its decision in *Braband v. Beech Aircraft Corp.*, 382 N.E.2d 252 (Ill. 1978), *cert. denied*, 442 U.S. 928 (1979), that general jurisdiction was proper over a Kansas airline manufacturer based entirely on the fact that, by virtue of an agreement with an independent distributor to market the manufacturer's products within Illinois, the manufacturer "could reasonably assume that airplanes which it manufactured would be owned by residents of Illinois"); *Administrators of Tulane Educ. Fund v. Cooley*, 462 So. 2d 696, 699-700, 705 (Miss. 1984) *cert. denied*, 474 U.S. 820 (1985) (outlining in nonquantitative terms Tulane University's activities in Mississippi—including, "most important[ly]," the fact that Tulane "regularly solicits and receives financial contributions" from "substantial numbers of alumni and friends in this state"—and concluding that general jurisdiction was appropriate based on "the extent of [those] activities [in Mississippi] without regard to what or how much more [Tulane] may do in Louisiana or elsewhere").

[6] *See Laufer v. Ostrow*, 434 N.E.2d 692, 695-96 (N.Y. 1982) (upholding the assertion of general jurisdiction over a New Jersey company whose sales representatives solicited New York customers on a "continuing rather than casual" basis, thereby generating a sales volume of $2,000,000 a year that, in the court's view, made it "evident that there is no unfairness in" subjecting the corporation to suit in New York on any cause of action).

by mere continuous business activity in a State if that activity is not substantial in nature.

Thus, for example, in *Cornelison v. Chaney*, 545 P.2d 264 (Cal. 1976), the California Supreme Court held that the California activities of a Nebraska trucker were "not so substantial or wide-ranging as to justify general jurisdiction over him to adjudicate all matters regardless of their relevance to the cause of action alleged by plaintiff," although the trucker "ha[d] been engaged in a continuous course of conduct that ha[d] brought him into the state almost twice a month for seven years . . . under a California license," with an average cargo worth approximately $20,000 per trip. *Id.* at 267.[7]

Similarly, in a series of cases the Nevada Supreme Court has refused to assert general jurisdiction over various California corporations, including a membership-type department store which, *inter alia*, had over 1,000 Nevada members, *Price & Sons v. District Court*, 831 P.2d 600 (Nev. 1992), and a California ski resort which advertised in Nevada and joined the Reno Chamber of Commerce, *Munley v. District Court*, 761 P.2d 414 (Nev. 1988). The Nevada Supreme Court has thus emphasized that "the level of contact with the forum state necessary to establish general jurisdiction is high." *Budget Rent-A-Car v. District Court*, 835 P.2d 17, 19 (Nev. 1992).[8]

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[7] In its recent decision in *Vons Co. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1092 (Cal. 1996), the California Supreme Court reaffirmed the approach taken to the issue of general jurisdiction in *Cornelison*, although "[n]o question of general jurisdiction" was raised on appeal therein.

[8] *See also e.g. Markby v. St. Anthony Hosp. Sys.*, 647 P.2d 1068 (Wyo. 1982) (general jurisdiction over Colorado hospital denied notwithstanding that, *inter alia*, the hospital collected $35,000 in fees from 58 Wyoming patients in the nine-month period preceding the suit, and operated an air ambulance service in Wyoming); *National Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769 (Tex. 1995) (general jurisdiction over non-profit trade association based in

(c) The decisions of the District of Columbia, Pennsylvania, and Maryland courts go one step further in defining the constitutional threshold for general jurisdiction. Those courts—while agreeing with California and its sister States that substantial (as well as ongoing) contacts are required to support general jurisdiction—hold that substantiality must be determined by looking to the proportion of the defendant's activities in the forum State as against its activities outside the forum State.

Thus, in *Hughes v. A.H. Robins Co.*, 490 A.2d 1140 (D.C. 1985), the District of Columbia Court of Appeals held that it would violate due process to assert general jurisdiction over a drug company (A.H. Robins) even though that company did over three million dollars of business in the District, where that sales activity amounted to only 0.7% of the company's total sales. That court reasoned that while "three million dollars is a lot of money, . . . when the cause of action is unrelated to any corporate activity in the forum, such revenues cannot be deemed 'substantial' within the meaning of *International Shoe*." *Id.* at 1150-51.

Similarly, in *Derman v. Wilair Servs.*, 590 A.2d 317, 323-24 (Pa. Super.), *review denied*, 600 A.2d 537 (Pa. 1991), the intermediate Pennsylvania appellate court surveyed the Pennsylvania general jurisdiction cases and concluded that under the reasoning of those cases a New York corporation that did only 1.5% of its business with Pennsylvania residents could not, consistent with due

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Silver Spring, Maryland denied notwithstanding the fact that the association had a member company in Texas which it serviced and from which it collected an unspecified amount of dues). *Cf. Thomason v. Chemical Bank*, 661 A.2d 595, 605 (Conn. 1995) (holding that general jurisdiction was proper over a New York banking corporation because "[a]lthough the trustee bank has no offices in this case, it conducts a substantial credit card business here, regularly solicits general banking business here and holds title (as mortgagee) to a substantial amount of real property in Fairfield county").

process, be brought within the general jurisdiction of the Pennsylvania courts on account of that business.[9]

Lewron Television, Inc. v. International Alliance of Theatrical Stage Employees & Moving Machine Operators, 378 A.2d 728 (Md. Ct. Spec. App. 1977), is most particularly to the point here.[10] In that case, suit was brought in Maryland by a resident plaintiff against an international union that had no office, bank accounts, property or investments in Maryland, 378 A.2d at 731-32, and a "very small percentage of its membership, less than one-third of one percent," in the State, *id.* at 735—circumstances that mirror the UBC's lack of a general presence in Alabama. The suit arose out of actions taken by the international outside of Maryland. *Id.* at 731. *Lewron* holds that in these circumstances general jurisdiction over the international is precluded by the Due Process Clause notwithstanding the international's continuous and advantageous relations with its Maryland members through its association with affiliated, per-capita-dues-paying local unions in Maryland, *see id.* at 731-35—relations that mirror those of the UBC and its Alabama members and affiliated, per-capita-dues-paying local unions in Alabama.

(d) The divisions in the state appellate courts are reflected, as well, in the case law in the federal courts of appeals.

(i) The Third Circuit has followed an approach that approximates that of Alabama and its sister States by upholding general jurisdiction when a legal en-

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[9] *Cf. Ultra Scientific, Inc. v. Yanusas*, No. 95-249, 1997 WL 21187, at *2 (R.I. Jan. 21, 1997) (a Connecticut company's sales in Rhode Island, amounting to less than 0.07% of its total sales in the year preceding the suit, were, standing alone, "not so substantial that anything [the corporation] did in Rhode Island should subject it to Rhode Island [general] jurisdiction").

[10] *See also Goodyear Tire & Rubber Co. v. Ruby*, 540 A.2d 482, 486-87 (Md. 1988) (contact with the forum State must be "fairly extensive" to support general jurisdiction).

tity engages in ongoing activity within the forum State, without regard to how "substantial" those activities are either in absolute terms or in proportion to the defendant's overall business. Thus, in *Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n,* 819 F.2d 434 (3d Cir. 1987), that court allowed the federal district court in Pennsylvania to exercise jurisdiction over a California Bank which engaged in electronic check-clearing transactions with a Pennsylvania financial institution "every business day," *id.* at 438, on behalf of Pennsylvania customers who accounted for less than 1% of the California Bank's total business, *id.* at 436. The Third Circuit held that these "every day" banking transactions were sufficient, standing alone, to support the Pennsylvania district court's exercise of general jurisdiction over the California Bank, *id.* at 438; and that court dismissed as "generally irrelevant" the fact that those banking transactions represented an insignificant percentage of the California Bank's total business, *id.*

(ii) The Fourth Circuit—like the District of Columbia cohort of States—has adopted the opposite view. In *Nichols v. G.D. Searle & Co.,* 991 F.2d 1195 (4th Cir. 1993), the defendant (G.D. Searle & Company) engaged in business within the forum State (Maryland) that was every bit as "every day"—and far more extensive in traditional corporate "presence" terms—than the activities of the California Bank in *Provident Nat'l Bank.* Specifically, Searle directly employed 17-21 "detail" and "consumer product" representatives in Maryland who actively promoted the companies' products in Maryland under the direction of two district managers who were likewise employed in Maryland. 991 F.2d at 1198. And, "[a]s a result of these representatives' efforts, Searle had $9,000,000 – $13,000,000 annual sales in Maryland between 1983 and 1987." *Id.*

Pointedly noting that the annual sales generated by Searle's promotional activities in Maryland accounted for

only "approximately two percent of its total sales," *id.*—and also noting that Searle made "less than one percent of its annual purchases" in Maryland, *id.*; *see also id.* at 1200—the Fourth Circuit held that the assertion of general jurisdiction over Searle would violate the Due Process Clause notwithstanding the fact that Searle's promotional activities in Maryland were unquestionably "continuous." In so holding, that court quoted the *International Shoe* dictum, 326 U.S. at 318, for the proposition that "[o]nly when the 'continuous corporate operation within a state [is] thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities' may a court assert general jurisdiction over a corporate defendant." 991 F.2d at 1199. The Fourth Circuit elaborated on that proposition as follows:

> As two leading jurisdictional commentators have noted, because specific jurisdiction has expanded tremendously, plaintiffs now may generally bring their claims in the forum in which they arose. Arthur T. von Mehren and Donald T. Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv.L.Rev. 1121, 1148-53 (1966). As a result, "obsolescing notions of general jurisdiction," *id.* at 1144, which functioned primarily to ensure that a forum was available for plaintiffs to bring their claims, have been rendered largely unnecessary. *Id.* at 1178-79. Thus, broad constructions of general jurisdiction should be generally disfavored. [991 F.2d at 1200 (case citations omitted).] [11]

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[11] *Cf. Madara v. Hall*, 916 F.2d 1510, 1516-17 (11th Cir. 1990) (refusing to allow general jurisdiction over a musical performer who had given concerts in Florida and whose "musical recordings are widely distributed throughout Florida," *id.* at 1517; "[i]f Hall could be sued on an unrelated cause of action because of concerts and record sales, then he likely would be amenable to suit in all the states of the union on any cause of action[; we] reject without further discussion the possibility that Hall is generally present in Florida for jurisdictional purposes based on these contacts," *id.* at 1516 n.7.).

(iii) The Fifth and Ninth Circuits have taken the logic of the Fourth Circuit's *Nichols* opinion one step further—a step advocated in Professors von Mehren's and Trautman's seminal *Jurisdiction to Adjudicate* article, 79 Harv. L. Rev. at 1143-44, cited in the *Nichols* opinion. Those courts delimit general jurisdiction to the situations in which a corporation's or an unincorporated association's activities are centered in the forum State in the way that was true in *Perkins* and that creates a "general business presence."

Thus, for example, in *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 375 (5th Cir. 1987), the Fifth Circuit refused to sanction general jurisdiction notwithstanding the fact that the corporate defendant had made $250 million in sales in the forum State over a five-year period through seventeen different independent distributors; those activities, in that court's view, did "not sum to the general business presence found to exist in *Perkins*." Similarly, in *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1362 & n.2 (5th Cir. 1990), general jurisdiction was denied notwithstanding the fact that the corporate defendant derived 12.9% of its revenues from chartering boats to subsidiaries headquartered in the forum State, on the ground that under *Perkins* and *Bearry v. Beech Aircraft*, "contacts of a more extensive quality and nature are required" to "constitute a general presence in the state" sufficient to support the exercise of general jurisdiction. *See also Wilson v. Belin*, 20 F.3d 644 (5th Cir.), *cert. denied*, 115 S. Ct. 322 (1994).

And, in *Amoco Egypt Oil Co. v. Leonis Nav. Co.*, 1 F.3d 848 (9th Cir. 1993), the Ninth Circuit summarized its jurisprudence in this area as follows:

> The Supreme Court has upheld general jurisdiction only once, in a case involving contacts significantly more comprehensive than those presented here. *Perkins*, [*supra*]. We have stated that "the *Perkins* holding that the cause of action need not arise out of the defendant's activities in the forum is limited to its

> unusual facts," *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242 (9th Cir. 1984), and regularly have declined to find general jurisdiction even where the contacts were quite extensive. [1 F.3d at 851 n.3 (citations omitted).] [12]

(iv) The federal cases reviewed above—while in direct conflict with each other—all represent attempts to give content to *International Shoe*'s suggestion that there may be instances in which "continuous corporate operations within a state [are] so substantial and of such a nature as to justify" general jurisdiction, 326 U.S. at 318, and to *Helicopteros*' inquiry into whether the corporation or other legal entity has had "the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*," 466 U.S. at 416. The Second Circuit, however, has recently added to the confusion in the area by propounding a very different inquiry for determining the constitutionality of the exercise of general jurisdiction.

In *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560 (2d Cir.), *cert. denied*, 117 S. Ct. 508 (1996), the Second Circuit proposed that Due Process Clause general jurisdiction analysis proceed in two stages. At the first stage, the burden is on the plaintiff to show that the defendant has contacts with the forum State that are sufficiently continuous and substantial in absolute terms to warrant the conclusion that the defendant has " 'minimum contacts' " with that State. *Id.* at 567, 570-73

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[12] The Tenth Circuit has recently staked out yet another position in this debate—one that places that court between the Third Circuit and the other courts of appeals discussed in text. In *Kuenzle v. HTM Sport-Und Freizeitgerate*, 102 F.3d 453, 457 (10th Cir. 1996), the Tenth Circuit formulated a four-factor test for general jurisdiction which looks at both the continuity of the business contacts and the "volume of business conducted in the forum state." Applying that test, *Kuenzle* denies general jurisdiction over an Austrian corporation which did substantial business in the forum State through an independent distributor.

(quoting *International Shoe*, 326 U.S. at 316).[13] If the court so concludes, it then proceeds to the second stage, where the court assesses the overall fairness of the assertion of general jurisdiction based on five "reasonableness" factors that this Court has previously identified and applied in its specific jurisdiction cases.[14] Here, however, the bur-

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[13] The *Metropolitan Life* majority notes that the "minimum contacts test" is "more stringent" in the general jurisdiction context than in the specific jurisdiction context. 84 F.3d at 568. But its opinion offers little insight into how continuous and substantial the legal entity's business contacts with the forum State must be to satisfy the minimum contacts test in the general jurisdiction context, except to make clear that those contacts need not on the one hand be as great as those of the corporation in *Perkins*, and must on the other hand be more than *de minimis*. Thus, as the majority explained in resolving what it characterized as the "close" question of the existence *vel non* of the requisite minimum contacts in *Metropolitan Life*:

> [W]hile it is clear that Robertson's contacts do not rise to the level of those described in *Perkins*, we cannot agree with the district court's assessment of Robertson's Vermont contacts as "*de minimis*." While it is true that Robertson "owned no property in Vermont, and exercised no control over its independent dealers," the contacts it did have with the state were more than sporadic and occasional. While Robertson's $4 million dollars in sales in Vermont between 1987 and 1993, standing alone, may not have been sufficient, its relationship with dealers selling its products and its so-called "authorized" builders, the visits to those dealers and builders by Robertson personnel, the advertising and support available to Vermont residents regarding Robertson's products, and the deliberate targeting of Vermont architectural firms as sales prospects, tips the balance in Met Life's favor and leads us to conclude that it satisfied the "minimum contacts" requirement of the due process test. [84 F.3d at 572-73.]

[14] In *Metropolitan Life*, the Second Circuit summarized those factors as follows:

> (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the

den is on the defendant to make a " 'compelling case' " that the exercise of jurisdiction would be " 'unreasonable,' " *id.* at 568 (quoting *Burger King*, 471 U.S. at 477)—a case that the *Metropolitan Life* majority held was made out on the "exceptional" facts there presented. *Id.* at 575.[15]

3. (a) There is no need to belabor the deleterious effect on litigants—and on the litigation system—of the conflict and confusion in the general jurisdiction Due Process Clause law as it stands. It suffices, we believe, to note that this threshold jurisdictional issue goes both to the legitimacy of the exercise of judicial authority—and hence to the legitimacy of the entire subsequent judicial proceeding—and to "our traditional concepts of fair play and substantial justice" as those concepts are embodied in the Constitution's Due Process Clause, *International Shoe*, 326 U.S. at 320. Such an issue, by its nature, most urgently calls for clarity and uniformity in the governing law.

(b) While that is so—and while we believe that it is dispositive at the *certiorari* stage—we would be derelict if we did not foreshadow our view, and our submission, as to the right Due Process Clause general jurisdiction rule.

In our view, the Fifth and Ninth Circuits are correct in holding that the Due Process Clause permits the assertion of general jurisdiction over a corporation, or other legal entity, only if that entity has centered its "general business"

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controversy; and (5) the shared interest of the states in furthering substantive social policies. [84 F.3d at 568, 573-75 (citing *Asahi Metal* and *Burger King*).]

[15] *Cf. Donatelli v. National Hockey League*, 893 F.2d 459 (1st Cir. 1990) (engaging in a similar two-stage analysis and concluding that general jurisdiction over the National Hockey League did not lie in Rhode Island notwithstanding the continuous and substantial business conducted in that State by a National Hockey League member, the Boston Bruins).

activities—*viz.*, its activities in managing and directing its overall affairs— in the forum State. That approach accords with *Perkins'* holding and is responsive to *Helicopteros'* formulation of the inquiry in a general jurisdiction case—whether the defendant has "the kind of continuous and systematic *general business contacts* [that existed] in *Perkins*," 466 U.S. at 416 (emphasis added). And, most importantly, that approach captures *International Shoe's* first principles.

International Shoe limits the assertion of jurisdiction over a legal entity to those instances in which such an exercise of judicial authority is "reasonable and just, according to our traditional notions of fair play and substantial justice." 326 U.S. at 320. And, *International Shoe* teaches that, in treating with a legal entity whose "presence" can be "manifested only by activities carried on in its behalf by those who are authorized to act for it," *id.* at 316, the calculus of "fair play and substantial justice" turns on "the quality and nature of the activity [in the forum State] in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure," *id.* at 319.

That calculus incorporates concepts of reciprocity between privileges and obligations and of proportionality in the relation between the two. The first premise is that "to the extent a corporation exercises the privilege of conducting activities within a state it enjoys the benefit and protections of the law of that state." 326 U.S. at 319. The second is that "the exercise of that privilege may give rise to obligations." *Id.* And, it follows from those premises, as the *International Shoe* Court said, that "so far as obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce [those obligations] can, in most instances, hardly be said to be undue." *Id.*

The converse is equally true. There is no virtue in expanding the concept of general jurisdiction so as to allow for suits, like the instant one, on claims arising—and based on activities occurring—outside the forum State merely because the legal entity carries on other delimited and lawful activities within the forum State. Neither reciprocity nor proportionality justify state jurisdiction over a legal entity in order to hold the entity to account for actions taken *elsewhere* in breach of some legal obligation imposed by some other State.

In such cases the in-State activities that were carried out under the "benefits and protections of the law of the forum state" did *not* generate any breach of the legal entity's concomitant obligations and the entity's activities that did allegedly breach a legal obligation were *not* carried out under the "benefits and protection of the law of the forum state."

Thus, we submit, it is only where, as in *Perkins*, the legal entity's activity in the forum State consists of "general business activity"—of managing and directing the enterprise as a whole—that it can be said to be "reasonable and just" to hold that entity to account in the forum State for all of its activities regardless of where those activities took place.

Keeping general jurisdiction within its conceptual bounds, we hasten to add, is entirely consistent with *International Shoe's* larger objective of making legal entities amenable to suit in the jurisdiction in which the entity has allegedly failed its legal obligations. As Professors von Mehren and Trautman predicted, *International Shoe*'s *specific jurisdiction* doctrine has proved protean and, as a result, "plaintiffs now may generally bring their claims in the forum in which they arose." *Nichols*, 991 F.2d at 1200. As the law now stands, a defendant accused of having acted within a State so as to cause injury to the plaintiff will, in the run of cases, have engaged in

activities within the forum State which are both sufficient in their nature, and sufficiently related to the plaintiff's claim, to support the assertion of specific jurisdiction.

(c) There is one final, and related, due process consideration that militates against the Alabama Supreme Court's expansive concept of general jurisdiction.

Corporations and unincorporated associations are, of course, expected to conform their conduct to the requirements of the law. To do so the entity obviously must know what the law is; fair notice is basic to any concept of due process.

Knowing the law is difficult enough for an entity operating on a national scale in a system in which there are fifty sovereign law-makers on the state level. But the difficulties become far, far greater—and the potential for unfairness becomes far, far greater—if actions taken in a particular State can give rise to legal proceedings not only in that State (under the law as authoritatively interpreted by the courts of that State), but in each and every State in which the entity has ongoing activities.

The instant case illustrates the point. As Justice Butts aptly stated in his dissenting opinion below, this case arises from a "bitter labor dispute" centered in International Falls, Minnesota where, it is alleged, the UBC sought to prevent BE&K from performing a construction contract in Minnesota and doing so nonunion. The lawfulness of what the UBC allegedly did in Minnesota ought to be determined by the Minnesota courts, applying Minnesota law, and if need be by a jury drawn from "the community [that] spent years debating and absorbing the turbulence of this bitter labor dispute." Pet. App. 21a (dissenting opinion).

The fact that the UBC happens to have some affiliated locals and some members in Alabama—and that BE&K, itself a corporation that conducts a nationwide business, happens to be headquartered in Alabama—does not make

it either "reasonable" or "just"—or consistent with "our traditional notions of fair play and substantial justice"—to call the UBC to account in Alabama, under Alabama's understanding and application of the law of Minnesota, for what is alleged to have transpired in Minnesota.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN T. DE CARLO
DANIEL J. HALL
DE CARLO, CONNOR & SELVO
500 South Virgil Avenue
Los Angeles, CA 90020

ANDREW D. ROTH
DAVID M. SILBERMAN
LAURENCE GOLD *
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Petitioner,

v.

BE&K CONSTRUCTION COMPANY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

JOHN T. DE CARLO
DANIEL J. HALL
DE CARLO, CONNOR & SELVO
500 South Virgil Avenue
Los Angeles, CA 90020

ANDREW D. ROTH
DAVID M. SILBERMAN
LAURENCE GOLD *
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

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APPENDIX A

[Released Jan. 10, 1997]

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1996-97

1951080 and 1951207

EX PARTE UNITED BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA, AFL-CIO

and

EX PARTE UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO

(IN RE: BE&K CONSTRUCTION COMPANY

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, *et al.*)

PETITIONS FOR WRIT OF MANDAMUS

(Jefferson Circuit Court, CV-95-6078)

PER CURIAM.

The United Brotherhood of Carpenters ("UBC") and the United Paperworkers International Union ("UPIU") separately petition this Court for writs of mandamus directing the Jefferson County Circuit Court to grant their motions to dismiss a lawsuit presenting claims of trespass, assault, and civil conspiracy. The writs are denied.

BE&K Construction Company ("BE&K"), a nonunion contractor headquartered in Birmingham, Alabama, sued five separate labor unions, including the UBC and the UPIU, along with four individual union officers, on claims

of trespass, assault, and civil conspiracy arising from an alleged campaign by the defendants to prevent BE&K from performing labor contracts in two paper and pulp mills, located in Minnesota and Oregon, respectively. BE&K sought compensation for damage resulting from acts of vandalism and violence it alleged union employees had committed over the course of several months during this campaign.

The UPIU, a labor organization based in Nashville, Tennessee, moved to dismiss upon the condition that it would consent to jurisdiction in Minnesota and waive the statute of limitations as a defense if BE&K filed the same action in Minnesota within 60 days of dismissal, pursuant to Ala. Code 1975, § 6-5-430. The UBC, a national labor organization based in Washington, D.C., moved to dismiss the action, arguing that the Jefferson County Circuit Court lacked personal jurisdiction over it. The other named defendants moved to dismiss the respective claims against them based on various grounds.[1] The trial court denied the UPIU's motion, rejecting its argument that the action against it should be dismissed based on the doctrine of forum non conveniens, as provided in § 6-5-430. The trial court also denied the UBC's

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[1] The following defendants' motions to dismiss were granted, based on the trial court's lack of personal jurisdiction over the defendants: William P. Lukawski, Jr., representative of the general president of the UBC and a resident of Minnetonka, Minnesota; Marc J. Furman, representative of the general president of the UBC, a resident of Portland, Oregon; the Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local No. 728, a labor organization having its principal office in Iron Mountain, Michigan; and the International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 783, a labor organization having its principal office in Milwaukee, Wisconsin. Defendant Rudolph H. Clay, a former international representative for the UBC, a resident of Vinemont, Alabama, moved to dismiss or, in the alternative, for a summary judgment; the trial court granted the summary judgment motion.

motion, holding that it had "general" jurisdiction over the claims against it.

BE&K is a "merit shop" contractor, which means that it employs subcontractors on the basis of the relative merit and price of the subcontractor's bid proposals without regard to whether the subcontractors employ union workers. Much of BE&K's construction work is for various companies in the pulp and paper industry. BE&K's workforce is "nomadic," in that its members legally reside in various states but migrate to sites across the country, sometimes for months at a time, in order to perform work projects that BE&K has contracted for. BE&K has 3,000 to 9,000 such employees, depending upon its workload at any given time; some of these employees are Alabama residents.

BE&K claims that in 1987 the defendants initiated a comprehensive nationwide campaign to force BE&K out of business. BE&K claims that the defendants employed various tactics to discourage industrial owners across the country from using BE&K employees to perform construction work, and that they utilized individuals and local trade unions in a number of states, including Alabama, to coordinate the anti-BE&K activities on construction sites across the country.

In 1989, Boise Cascade, Inc., selected BE&K to perform major construction projects at a pulp and paper mill in International Falls, Minnesota, and at a similar plant in St. Helens, Oregon. Boise Cascade subsequently assigned BE&K the administrative responsibilities over 19 other subcontractors at the International Falls plant. BE&K then constructed a "mancamp" of mobile homes and other portable facilities at that plant, where it housed the nonunion workers it had brought in from across the country to work on the project.

BE&K claims that the UBC and the UPIU, along with the other named defendants, chose the International Falls

project as its target for anti-BE&K activities, conspired to prevent BE&K from carrying out its obligation to Boise Cascade, and mounted a campaign of harassment, violence, and "strategic tactics" to accomplish that end. It alleged that this campaign began at the International Falls plant in July 1989, when union employees walked off their jobs there in protest of the company's hiring of BE&K. BE&K then brought in additional employees, referred to by the defendants as "scab" labor, to perform the union members' jobs; its doing so led to increased acts of violence and harassment. Members of various unions began picketing at the International Falls jobsite, the BE&K mancamp, and the BE&K on-site personnel office, and, BE&K alleges, vandalized cars and property.

BE&K claims that on July 21, 1989, union members stopped a bus carrying BE&K employees to the International Falls jobsite, began beating on the bus, and smashed its windows. Although BE&K thereafter obtained a temporary restraining order in the District Court of Koochiching County, Minnesota, the tension at the International Falls jobsite intensified. The picketing continued intermittently, and BE&K claims that union officials and members from various parts of the country arrived in International Falls to help plan ways to continue harassing BE&K by "furtive and anonymous" means. On August 28, 1989, a group of 70-100 union employees allegedly arrived in International Falls by chartered bus and then gathered in front of the BE&K personnel office, attempting to block access to it and threatening BE&K employees. Thereafter, BE&K fenced in its mancamp and hired a security company to monitor the mancamp and worksite.

On September 9, 1989, 200 to 400 persons assembled at the International Falls plant mancamp for a confrontation that escalated into a full-scale riot. The mob destroyed the fence around the mancamp and entered the area, broke windows, overturned vehicles, set trailers on

fire, assaulted the security officers, and otherwise vandalized the mancamp. The International Falls police eventually calmed the melee and arrested 56 rioters.

Over the next three years, there were continued reported acts of violence, harassment, and vandalism at the International Falls site, which BE&K alleges were caused by the UBC, the UPIU, and other labor organizations. BE&K alleges that the unions' employees systematically collected license plate numbers from the vehicles of BE&K employees and sent them to representatives in the licensees' home states to obtain information about the licensees' identity; BE&K specifically alleged that some of the license numbers were sent to UBC representative Rudolph Clay in Vinemont, Alabama. BE&K also alleges that the various unions produced flyers and handbills that favorably described the International Falls riot and threatened similar riot activity at other mills employing BE&K workers, particularly at a mill in Arkansas. BE&K also claims that union workers at the Boise Cascade plant in St. Helens, Oregon, began aggressive picketing after the riot at International Falls.

With these facts in mind, we first address whether the trial court erred in refusing to dismiss the action against the UPIU without prejudice, on the basis of § 6-5-430. That section provides:

> "Whenever, either by common law or the statutes of another state or of the United States, a claim, either upon contract or in tort has arisen outside this state against any person or corporation, such claim may be enforceable in the courts of this state in any county in which jurisdiction of the defendant can be legally obtained in the same manner in which jurisdiction could have been obtained if the claim had arisen in this state; provided, however, the courts of this state shall apply the doctrine of forum non conveniens in determining whether to accept or decline to take jurisdiction of an action based upon

> such claim originating outside this state; and provided further that, if upon motion of any defendant it is shown that there exists a more appropriate forum outside this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interests of justice, the court must dismiss the action without prejudice. Such dismissal may be conditioned upon the defendant or defendants filing with the court a consent (i) to submit to jurisdiction in the identified forum, or (ii) to waive any defense based upon a statute of limitations if an action on the same cause of action is commenced in the identified forum within 60 days of the dismissal."

This section requires the trial courts of this state to apply the doctrine of forum non conveniens in deciding whether to exercise jurisdiction over a cause of action accruing outside the state. *Ex parte Southern Ry.*, 556 So.2d 1082 (Ala. 1989). All of the factors under this section must be positively found to justify a dismissal, and the defendant has the burden of proving those factors. *Donald v. Transport Life Ins. Co.*, 595 So.2d 865 (Ala. 1992). Whether to dismiss an action based on the doctrine of forum non conveniens is within the sound discretion of the trial court, and its ruling on that issue will not be reversed absent an abuse of that discretion. *Ex parte Preston Hood Chevrolet, Inc.*, 638 So.2d 842 (Ala. 1994).

Under § 6-5-430 the trial court must consider where the acts giving rise to the action occurred, the convenience of the parties and the witnesses, and the interests of justice, when determining whether to dismiss an action under the doctrine of forum non conveniens. Additionally, the trial court should consider the location of the evidence and any other relevant matter, in order to assess the degree of any actual difficulty and hardship that will result to the defendant by litigating the case in the plaintiff's chosen forum. *Ex parte Southern Ry.*, supra.

Considering the factors set out in § 6-5-430, we hold that BE&K's choice of Alabama as the forum in which to litigate this action should not be disturbed. Although it is undisputed, as the UPIU points out, that many of the acts giving rise to BE&K's claims occurred at the International Falls plant in Minnesota, that fact alone does not warrant a dismissal based on § 6-5-430. Of paramount importance is the fact that BE&K is an Alabama corporation, with its headquarters in Birmingham. See *Ex parte Integon Corp.*, 672 So.2d 497 (Ala. 1995); *Ex parte Preston Hood Chevrolet*, supra. BE&K employs Alabama citizens and pays taxes in this state; therefore, Alabama has a compelling interest in the outcome of this litigation, especially in light of BE&K's allegation that the UPIU conspired to put it out of business.

We also note that the very nature of BE&K's claims makes it impossible to balance the scales of convenience so as to satisfy everyone who may be called to testify in this case. BE&K has alleged a conspiracy to conduct a national campaign of confrontation, which BE&K says culminated in a riot at the International Falls plant in Minnesota and in an incident at Boise Cascade's St. Helens plant in Oregon. BE&K anticipates that witnesses to these incidents, as well as witnesses to an incident that occurred at a mill in McGehee, Arkansas, will be called to testify. Furthermore, the UPIU's headquarters is located in Nashville, Tennessee, and the UBC's headquarters is located in Washington, D.C.; therefore, it would be reasonable for BE&K to anticipate calling witnesses from those localities as well. The United States Supreme Court stated in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981), that "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient." This Court has also recognized that it makes little sense to move a case from Alabama to another forum in order to accommodate out-of-state witnesses when to do so would necessarily inconvenience those witnesses who reside within Alabama. See *Keelean v. Central Bank of*

the South, 544 So.2d 153, 158 (Ala. 1989) ("It has not been shown how the parties and witnesses will be inconvenienced in coming to Alabama to litigate this matter, any more than the plaintiffs would be inconvenienced in having to go to Florida"). This Court in *Ex parte Auto-Owners Ins. Co.*, 548 So.2d 1029, 1032 (Ala. 1989), quoting the United States Supreme Court's first authoritative statement on the doctrine of forum non conveniens in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947), noted that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." This Court also emphasized in *Ex parte Auto-Owners* that "[t]he prevailing question of whether a case should be entertained or dismissed 'depends largely upon the facts of the particular case and is in the sound discretion of the trial judge." 548 So.2d at 1032, quoting *Restatement (Second) of Conflict of Laws* § 84 at 251 (1971). The pertinent facts in this case do not indicate that the balance of considerations is so strongly in favor of the UPIU as to justify a holding by this Court that the trial court abused its discretion in refusing to dismiss BE&K's action.

We now address the issue whether the trial court erred in determining that the UBC is subject to the general jurisdiction of Alabama courts and may reasonably be compelled to litigate the claims against it here. The UBC emphasizes that the Due Process Clause of the 14th Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant, and it argues that the trial court does not have such power here.

In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the United States Supreme Court established the "minimum contacts" standard, geared toward assessing the inherent fairness of compelling a nonresident defendant to submit to a state's jurisdiction, based upon the nature of the defendant's contacts with the forum state. The Court carefully distinguished the difference between

"specific" personal jurisdiction, which applies when an action arises directly out of forum-based activities, and "general" personal jurisdiction, which applies when the action is not directly founded on forum-based activity. *International Shoe*, 326 U.S., at 317. While a showing of certain minimum contacts suffices to support a holding of specific jurisdiction, the plaintiff must go further and establish that the defendant's contacts with the forum have been "continuous and systematic" in order to invoke general jurisdiction. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984). Even where the necessary level of contact between the nonresident defendant and the forum state exists, the Due Process Clause may nevertheless act to divest the state of its power to render a valid judgment. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Thus, the judicial inquiry into the question of general jurisdiction has two prongs; first, the Court must examine the defendant's contacts with the forum; if they reach the proper constitutional level, the Court must then assess the constitutionality of exercising jurisdiction, based upon considerations of fair play and substantial justice. *World-Wide Volkswagen Corp.*, 444 U.S., at 292; *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987).

The United States Supreme Court has given some guidance in determining what level of contact is systematic and continuous enough to justify the imposition of a state's general jurisdiction over at foreign defendant. For example, in *Perkins v. Benguet Consolidated Mining Co.*, supra,, an Ohio state court sought to exercise general jurisdiction over a mining company whose properties were in the Philippine Islands, but whose operations there were completely halted during the Japanese occupation of the islands during World War II. During that interim, the president of the company, who was also its general manager and principal stockholder, returned to his home in

Ohio and there maintained an office, where he kept business files, carried on business correspondence, drew and distributed salary checks to employees, and generally conducted most of the day-to-day operations of his company. He also maintained two active Ohio bank accounts with substantial balances, used a local bank as a transfer agent for the stock of the company, held directors' meetings in his home, dispatched funds to cover the costs of buying new machinery for the Philippines operations, and supervised the overall post-war rehabilitation of his business. The Supreme Court found that these activities constituted a continuous and systematic supervision of the necessarily limited wartime activities of the company, and were sufficient to subject the mining operation to the general jurisdiction of the Ohio Court.

In *Helicopteros Nacionales*, supra, the Supreme Court held that the nature and quantity of a Colombian corporation's contacts with Texas were not sufficient to subject it to the general jurisdiction of that state's courts in a wrongful death case brought by a Texas resident. The Court noted that the defendant corporation had no place of business in Texas and was not licensed to conduct business there, then went on to examine the substance of the defendant's limited contacts with Texas. These contacts consisted of the defendant's sending its chief executive officer to Houston to negotiate a major transportation-services contract with a Texas company; receiving $5 million in payment on the contract by means of a check drawn on a Houston bank; purchasing 80% of its helicopter fleet, along with other equipment and training services, from a Texas corporation; and sending personnel to the Texas corporation's facilities for training. *Helicopteros Nacionales*, 466 U.S., at 417. These contacts, while significant, represented an isolated period of contact that was tied to one business transaction, albeit a large one; thus, this contact was not sufficiently continuous and systematic to support a finding of general jurisdiction over the defendant. *Helicopteros Nacionales*, 466 U.S., at 416.

Few Alabama cases have specifically addressed the issue of what contacts will subject a defendant to the general jurisdiction of this state's courts, and those that have done so have focused on the activities of corporations seeking to avail themselves of profit in this state. In *Ex parte Newco Mfg. Co.*, 481 So.2d 867 (Ala. 1985), the widow of a repairman who died when he was struck by a falling machine filed a products liability action against the foreign manufacturer of a small part that had been incorporated into the machine. This Court noted that the foreign manufacturer systematically marketed its goods to residents of this state, either through an independent manufacturer representative or by telephone and mail contact. Although these sales amounted to only $65,000 to $85,000 over a five-year period, this Court found that it was a continuous and deliberate course of merchandising on the part of the foreign manufacturer, which sought to benefit from those activities in Alabama, and that such contact invoked the general jurisdiction of this state's courts. Likewise, in *Atlanta Auto Auction, Inc. v. G & G Auto Sales, Inc.*, 512 So.2d 1334 (Ala. 1987), this Court determined that a Delaware automobile auction company, which was not licensed to do business in Alabama, nevertheless purposefully targeted Alabama residents through a continuous and systematic course of mail services, and it held that this was sufficient contact to invoke personal jurisdiction over the company.[2] Because the nonresident defendants in *Newco* and *Atlanta Auto Auction* initiated contacts with the state solely for their own profit, availing themselves of the privileges of conducting business here, this Court determined that such activities were sufficiently

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[2] See, also, *Murray v. Alfab, Inc.*, 601 So.2d 878 (Ala. 1992), wherein this Court discussed both specific and general jurisdiction in the context of a contract dispute, without specifying which level of personal jurisdiction was applicable, and held that personal jurisdiction over the defendant Murray had been invoked; and *Greene v. Connelly*, 628 So.2d 346 (Ala. 1993), wherein this Court differentiated between general and specific jurisdiction, but applied the elements of specific jurisdiction.

systematic and continuous to support a finding of general jurisdiction, and determined that it was fair and reasonable under the Due Process Clause to invoke such jurisdiction.

This case differs from *Newco* and *Atlanta Auto Auction* in that the UBC is an unincorporated, nonprofit entity whose purpose is to promote the pro-labor goals of its members, not to avail itself of the privileges of doing business with Alabama residents. The UBC does not maintain an office, a bank account, or property in Alabama. It does maintain the membership of 10 local affiliates, whose 2,584 resident members represent only one-half of one percent of the UBC's total membership. The UBC concludes that its lack of property or formal attachment to the state, its nonprofit status, and the presence of only a small percentage of its membership in this state conclusively show that its contacts are not systematic and continuous and thus do not invoke this state's general jurisdiction in this action.

We note that in 1994 the UBC's Alabama membership collectively paid $198,022 in dues and that the UBC paid over $50,000 in funeral benefits to Alabama members. Although the UBC's collection of dues is not for profit, it is systematic and continuous. During the period in question, the UBC maintained Rudolph Clay, a local representative of the general president, who provided the UBC with weekly reports concerning anti-BE&K activities throughout the state. The UBC has consistently directed and/or supported pro-union activities at Alabama jobsites, and has conducted rallies, funded radio advertisements, held press conferences, and provided handbills for members to distribute at jobsites that employ nonunion workers. Although Alabama members of the UBC do not constitute a large portion of its overall organization, they do maintain a continuous relationship with the UBC in order to systematically further their admitted goal of discouraging contractors who do not provide union labor.

Our review does not end with this conclusion, however; we must next determine whether the exercise of such jurisdiction is reasonable under the Due Process Clause. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). The United States Supreme Court has explained that a determination of the reasonableness of a state court's exercise of jurisdiction depends on a variety of factors. The court must consider the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief, and the interstate judicial system's interest in obtaining the most efficient resolution of controversies; *Burger King Corp.*, supra, and *Asahi Metal Industry Co., Ltd.*, supra. Having noted earlier that BE&K is an Alabama corporation; and having concluded that Alabama has a compelling interest in the outcome of this litigation and that the burden on the out-of-state defendants that would be imposed by defending in Alabama and the inconvenience of certain witnesses in appearing in Alabama are not so great as to overcome BE&K's choice of forum, we must also conclude that traditional notions of fair play and substantial justice would not be violated if the UBC is required to submit to the jurisdiction of an Alabama court.

For the foregoing reasons, the writs are denied.

WRITS DENIED.

Hooper, C. J., and Almon, Shores, Houston, and Kennedy, JJ., concur.

Maddox and Butts, JJ., dissent.

MADDOX, JUSTICE (dissenting).

The defendants in this case are seeking the same kind of relief defendants in FELA actions sought for years—the right to have the case tried where the cause of action arose. The Legislature, in 1987, adopted what is now § 6-5-430, Ala. Code 1975, to allow defendants like these to ask that the action be dismissed. Robert D. Hunter, who served as special counsel on tort reform when the Legislature passed the so-called tort reform package, which included what is now § 6-5-430, stated the following about the forum non conveniens statute:

> "Venue is the place of trial. Before the passage of Alabama's tort reform legislation, Alabama's rules governing venue were subject to abuse in three areas.
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> "First, article XII, section 232 of the Alabama Constitution provides the terms under which foreign corporations may do business in Alabama. This section further provides that such corporations may be sued in any county where they do business. Cases held that this constitutional directive took precedence over the statutory venue considerations that apply to suits against other categories of defendants. Citizens of Alabama, therefore, found themselves defending suits in counties where they neither resided nor did business, merely because a foreign corporation was included as a defendant and the foreign corporation did business in the county where the suit was brought. Proponents of reform saw no reason for rules of venue for claims against citizens of Alabama to be overruled by a foreign corporation's presence in the suit.
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> "Second, once the plaintiff selected an appropriate jurisdiction under section 232 or under Alabama's statutory venue provision, the case could not be transferred for the convenience of the parties and witnesses. This restriction added to the expense of litigation and afforded plaintiffs an almost unchecked

ability to forum shop within the state. Litigation was at times unduly expanded by the inclusion of a 'venue' defendant to secure a favorable forum.

"Finally, actions having no contact with Alabama were being 'imported' for trial in Alabama's courts. This case importation was most prevalent in actions under the Federal Employers Liability Act. Such cases could not be removed to federal court, where transfer under the doctrine of forum non conveniens might be available. Cases not arising in Alabama and not involving any Alabama citizens as litigants might nonetheless be tried at the expense of Alabama's taxpayers.

"These problems were addressed by three measures in the tort reform package: (1) Act No. 87-164 (constitutional amendment relating to venue for foreign corporations); (2) Alabama Code section 6-3-21.1 (forum non conveniens); and (3) Alabama Code section 6-5-430 (foreign causes of action).

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"The ability to transfer cases within Alabama for the convenience of parties and witnesses and in the interest of justice was denied Alabama courts prior to passage of Alabama Code section 6-3-21.1 in this tort reform effort. Courts are now required to transfer a case to a county in which the case originally might have been filed if the convenience of the parties and witnesses or the interests of justice so dictate. Although the statute uses the mandatory term 'shall,' judicial discretion will necessarily be involved in considering the factors of convenience and the interest of justice.

"As introduced, the forum non conveniens proposal referred only to a 'change' of venue. Although the Alabama Constitution grants courts the power to 'change' venue, existing statutes speak in terms of

both a 'change' and a 'transfer' of venue. One 'change' of venue for cause is permitted any party, while a defendant may move for 'transfer' of venue as provided in the Alabama Rules of Civil Procedure. Those who drafted section 6-3-21.1 were of the view that venue was 'changed' and actions were 'transferred,' a view apparently shared by those who drafted Alabama Rule of Civil Procedure 82. During the course of Senate debate, the reference was expanded to included 'change or transfer' of venue. This language was altered to insure that section 1(b), which specified the new right, was considered cumulative to previously existing rights.

"While the new section 6-2-21.1 grants courts the power to employ the forum non conveniens doctrine on an *intrastate* level, the amendment to Alabama Code section 6-5-430, by Act No. 87-182, grants that power on an *interstate* level. Interstate forum non conveniens is the concept expressed as follows by the Restatement (Second) of Conflict of Laws: 'A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff.' Most states exercise the doctrine in accepting or declining jurisdiction over cases arising outside their borders.

"A court of one state lacks the power to transfer an action to the court of another state, but the following options are available to the court wishing to decline jurisdiction:

> "(1) The case may be dismissed;
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> "(2) the case may be dismissed, conditioned upon the defendant's consent to acceptance of service of process in the more appropriate jurisdiction and waiver of statute of limitations defenses; or,

> "(3) the case may be stayed pending institution of suit and service or process on the defendant in the more appropriate forum.
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> "As introduced, H. 26 incorporated the first of the above alternatives and required a court to dismiss a foreign cause of action when a more convenient forum for the case existed outside Alabama. The Governor pointed out that since section 6-5-430 involved subject matter jurisdiction, which cannot be waived, it would be abused by a defendant who allowed all applicable limitation periods for bringing a suit to expire before challenging the jurisdiction of the Alabama court. Under such circumstances, the plaintiff would be left with no means of pursuing his claim. The Governor proposed that ACJRC [Alabama Civil Justice Reform Committee] accept the second of the alternatives listed above and that the court be allowed to condition dismissal of a foreign cause of action on a defendant's consent to the jurisdiction of the more appropriate forum and waiver of certain defenses based on statutes of limitation. ACJRC consented to this amendment to its bill, and the bill was passed without further significant change."

Robert D. Hunter, *Alabama's 1987 Tort Reform Legislation*, 18 Cumb. L. Rev. 282, 286-91 (1988) (footnotes omitted).

It appears to me that the sole purpose for adopting the doctrine of forum non conveniens in 1987 was to allow the courts to dismiss an action when a more convenient forum existed outside the state. I agree with the reasons Justice Butts states in his dissenting opinion for concluding that the trial judge abused his discretion in not applying the statute and dismissing this action on the basis that a more convenient forum exists outside Alabama.

BUTTS, JUSTICE (dissenting).

I respectfully dissent from the majority opinion. As to the issue of forum non conveniens raised in case no. 1951207, the majority correctly recognizes that, under Ala. Code 1975, § 6-5-430, the Court is required to weigh these factors in determining whether to dismiss an action under the doctrine of forum non conveniens: (1) where the acts giving rise to the action occurred, (2) the convenience of the parties and witness, (3) the interests of justice, (4) the location of the evidence, and (5) any other matter relevant to an assessment of the degree of actual difficulty and hardship that will result to the defendant by litigating the case in the plaintiff's chosen forum. *Ex parte Southern Ry.*, 556 So.2d 1082 (Ala 1989). However, after reciting these factors, the majority simply ignores the evidence that United Paperworkers International Union, AFL-CIO ("UPIU"), presented as to each of them.

UPIU has shown that *none* of the acts giving rise to this action took place in Alabama, or even in a closely neighboring state; on the contrary, it is clear that the target of the alleged anti-BE&K Construction Company ("BE&K") campaign was in International Falls, Minnesota, and that the lawsuit centers on activities that allegedly took place there.[3] UPIU has shown that it is the

[3] UPIU does acknowledge that an allegation in BE&K's complaint that Rudolph Clay, a representative of United Brotherhood of Carpenters and Joiners of America, AFL-CIO ("UBC"), residing in Alabama, received from UBC a list of license plate numbers allegedly taken from the automobiles of Alabama-based BE&K workers who had traveled to International Falls to work on the Boise Cascade project; UPIU alleged that Clay provided UBC with information about these Alabama residents based on information he obtained from tracing the car tags. As UPIU points out, however, the trial court has entered a summary judgment in Clay's favor on that allegation, apparently holding that the evidence clearly shows that the acts did not take place. BE&K did not appeal from the summary judgment for Clay. UPIU correctly states that

citizens of International Falls, not of Alabama, who have been involved in and affected by the ongoing conflict between BE&K and UPIU. It is the Minnesota courts that have adjudicated BE&K's petitions for injunctions against the defendants, and it is the Minnesota economy that has been consistently affected by the union unrest.

UPIU has shown that it will call at least 28 residents of Minnesota to testify at trial, including managers from Boise Cascade and others who were eyewitnesses present in International Falls during the period in question. Most of these witnesses are unaffiliated with UPIU and have no particular impetus to travel from Minnesota to Alabama merely to testify live, when they could comfortably give deposition testimony where they reside. However, because many of the alleged acts, including the riot, took place over six years ago, the credibility of eyewitness testimony and the need for cross-examination are particularly crucial to UPIU's defense; under these circumstances, depositions would be an especially poor substitute for live testimony.

In the face of this evidence, the majority holds that the only fact of "paramount importance" is that BE&K is an Alabama corporation headquartered in Birmingham. Moreover, the majority holds that the nature of the case virtually assures that someone will be inconvenienced by it and, even though it is not certain whether BE&K will even call witnesses from Alabama, the majority finds no reason to risk a possible inconvenience to them.

I do not agree that BE&K's mere corporate residence in Alabama is sufficient to justify litigating this lawsuit thousands of miles away from the place where it primarily arose, where the most compelling evidence is found, and where reside a large number of witnesses whose live testimony is critical to UPIU's defense. Moreover, I do not agree that a mere chance of inconvenience for Alabama

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all other acts alleged took place outside Alabama, and primarily in International Falls.

witnesses who have not yet been named should outweigh the definite and prohibitive inconvenience of trying to bring 28 named witnesses from International Falls to Alabama to give the live testimony that is essential to UPIU's defense.

While the plaintiff's choice of forum should rarely be disturbed, UPIU has clearly shown how the parties and witnesses will be inconvenienced in coming to Alabama to litigate this matter. Under these circumstances, I would hold that the interests of justice would be better served by granting UPIU's petition for the writ of mandamus and directing the trial court to enter an order granting UPIU's motion to dismiss this action without prejudice.

As to the issue of general jurisdiction raised in case no. 1951080, I agree with the majority that Alabama has sufficient contacts with UBC to establish its general jurisdiction over this lawsuit. However, even where the necessary level of contact between the nonresident defendant and the forum state exists, the Due Process Clause may nevertheless divest the state of its power to render a valid judgment. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The judicial inquiry into general jurisdiction has two prongs; first, the court must examine the defendant's contacts with the forum and, if they reach the proper constitutional level, the court must then assess the constitutionality of imposing jurisdiction, based upon considerations of fair play and substantial justice. *World-Wide Volkswagen*, 444 U.S. at 292; *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987). I would not, as the majority has done, summarily hold that the second prong has been met here.

In analyzing this second prong, the court must consider the burden on the defendant, the interest of the forum state, the plaintiff's interest in obtaining relief, and the interstate judicial system's interest in obtaining the most

efficient resolution of controversies; *Burger King Corp. v. Rodzewicz,* 471 U.S. 462 (1985); *Asahi Metal Industry Co.,* supra. Even where the facts show the necessary level of contact to impose general jurisdiction, such jurisdiction will not normally apply, because it is difficult to establish the factors necessary to meet the fair and reasonable test. See 2 J. Moore, *Federal Practice,* ¶ 4.25, pp. 4-258 through 4-267 (2d ed. 1982).

I do not believe this test has been met here. The Boise Cascade jobsite and areas surrounding International Falls, Minnesota, stand at the center of this lawsuit. That is the place where the vast majority of acts were alleged to have been committed, where critical witnesses to these acts reside, and where the community has spent years debating and absorbing the turbulence of this bitter labor dispute. In contrast, none of the acts complained of occurred in Alabama, the burden of bringing key witnesses to Alabama is an onerous one, and the Alabama citizenry has had little exposure to or impact from the acts at issue. I would therefore conclude that, notwithstanding the application of general jurisdiction, the judicial inefficiency of attempting to litigate this lawsuit thousands of miles from its focal point must necessarily overshadow BE&K's right to choose Alabama as its forum. The structure of the Due Process Clause forbids a state court to exercise personal jurisdiction over a foreign defendant under circumstances that would offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 310 (1945). Because I believe such circumstances are present in this case, I would grant UBC's petition for the writ of certiorari and direct the trial court to enter an order dismissing BE&K's claims against UBC, without prejudice.

APPENDIX B

STATE OF ALABAMA
UNIFIED JUDICIAL SYSTEM

Case Number CV 95-6078

BE&K CONST. Co.

v.

UNITED BROTHERHOOD OF CARPENTERS

CASE ACTION SUMMARY
CONTINUATION

Date	ACTIONS, JUDGMENTS, CASE NOTES
3/22/96	The motion to dismiss of defendants, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, William P. Lukawski and Marc J. Furman, is denied in part and granted in part. Insofar as United Brotherhood of Carpenters and Joiners of America, AFL-CIO is concerned, said motion is denied, the Court finding general jurisdiction over said defendant. All claims against William P. Lukawski and Marc J. Furman are dismissed, the Court finding that said defendants are not subject to its jurisdiction.

/s/ Thomas A. Woodall
THOMAS A. WOODALL
Circuit Judge

Supreme Court, U.S.
FILED
JUN 5 1997
OFFICE OF THE CLERK

No. 96-1447

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Petitioner,

VS.

BE&K CONSTRUCTION COMPANY, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

E. Mabry Rogers
Matthew H. Lembke*

BRADLEY ARANT ROSE & WHITE LLP
2001 Park Place, Suite 1400
Birmingham, Alabama 35203
(205) 521-8000

Counsel for Respondent

**Counsel of Record*

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

QUESTION PRESENTED

Whether the standard for determining whether the exercise of general *in personam* jurisdiction comports with the requirements of the Due Process Clause as set out in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and as refined in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), requires further refinement?

RULE 29.6 LISTING

(1) BE&K, Inc. (privately held, parent corporation of respondent BE&K Construction Company);

(2) Polar BE&K Latvia, Ltd. (partially owned subsidiary);

(3) Rentinko Oy (partially owned subsidiary); and

(4) Digital Training Sciences Corporation (partially owned subsidiary).

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No. 96-1447

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Petitioner,

VS.

BE&K CONSTRUCTION COMPANY, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

Respondent BE&K Construction Company ("BE&K") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Supreme Court of Alabama's decision denying a petition for writ of mandamus filed by petitioner.

OPINIONS BELOW

The decision of the Supreme Court of Alabama is reported at 688 So. 2d 246 (1997), and is also attached to the petition as Appendix A. The decision of the Circuit Court of Jefferson

County, Alabama is unreported, but is attached to the petition as Appendix B.

STATEMENT OF THE CASE

Petitioner failed to include in its Statement of the Case all the facts in the record which reveal the extent of petitioner's contacts with Alabama. In its opinion below, the Supreme Court of Alabama set out the facts on which it relied in assessing the constitutionality of the exercise of general *in personam* jurisdiction in this case:

> The [United Brotherhood of Carpenters] does not maintain an office, a bank account, or property in Alabama. It does maintain the membership of 10 local affiliates, whose 2,584 resident members represent only one-half of one percent of the UBC's total membership.
>
> ***
>
> We note that in 1994 the UBC's Alabama membership collectively paid $198,022 in dues and that the UBC paid over $50,000 in funeral benefits to Alabama members. Although the UBC's collection of dues is not for profit, it is systematic and continuous. During the period in question, the UBC maintained Rudolph Clay, a local representative of the general president, who provided the UBC with weekly reports concerning anti-BE&K activities throughout the state. The UBC has consistently directed and/or supported prounion activities at Alabama jobsites, and has conducted rallies, funded radio advertisements, held press conferences, and provided handbills for members to distribute at jobsites that employ nonunion workers. Although Alabama members of the UBC do not constitute a large portion of its overall organization, they

> do maintain a continuous relationship with the UBC in order to systematically further their admitted goal of discouraging contractors who do not provide union labor.

Pet. App. 12a.

In addition to those facts noted by the Supreme Court of Alabama, the record contains additional facts relating to petitioner's contacts with Alabama. Petitioner had employed its local representative of the general president since 1971, and that individual resided and directed petitioner's activities in Alabama. Since 1987, that representative (along with other officials from petitioner's Washington, D.C. office) had spearheaded and appeared at numerous events across Alabama as part of petitioner's nationwide campaign to force BE&K out of business. Furthermore, petitioner has negotiated several labor agreements with Alabama employers and with other employers concerning projects in Alabama.

After the trial court ruled that it had general *in personam* jurisdiction over petitioner, petitioner filed a petition for writ of mandamus in the Supreme Court of Alabama seeking to have that ruling overturned. At the outset of its discussion of that issue in its opinion, the Alabama Supreme Court recognized that the case would be governed by the "minimum contacts" analysis outlined by this Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Pet. App. 8a. The Alabama court also noted that, in the context of general jurisdiction, there is a further requirement that a plaintiff establish that "the defendant's contacts with the forum have been 'continuous and systematic.'" Pet. App. 9a (citing *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952)). Based on the facts described above, the Alabama Supreme Court concluded that petitioner's contacts with Alabama were sufficiently continuous and system-

atic to warrant exercise of general jurisdiction. That, however, was not the end of the court's analysis. The court then analyzed whether exercise of general jurisdiction over petitioner would be reasonable in light of factors enumerated in *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). Pet. App. 13a. After examining those factors, the Supreme Court of Alabama concluded that "traditional notions of fair play and substantial justice would not be violated if the UBC is required to submit to the jurisdiction of an Alabama court." *Ibid.*

REASONS FOR DENYING THE WRIT

I. This case involves the factbound application of the settled due process standard relevant to the exercise of general *in personam* jurisdiction, and there is no conflict of authority among the lower federal courts or state courts concerning this standard.

The standard for determining whether a court's exercise of general *in personam* jurisdiction comports with the requirements of the Due Process Clause is well settled. In *International Shoe*, this Court established the benchmark against which jurisdiction over a defendant not physically present in the forum state be assessed: such a defendant must "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." 326 U.S. at 316 (internal quotation omitted). Although the Court in *International Shoe* indicated that exercise of jurisdiction over a defendant in a case concerning matters unrelated to the defendant's activities within the forum state could be constitutionally permissible, the standard to be employed in that situation was not refined until later cases. In *Helicopteros*, the Court indicated that the *International Shoe* benchmark would be satisfied in the general jurisdiction context when the defendant

had "continuous and systematic" contacts with the forum state. 466 U.S. at 415-416; *see also Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 448 (1952) (upholding exercise of general jurisdiction where defendant corporation's president had engaged in "continuous and substantial" supervision in the forum state of the defendant's activities).

The state courts and lower federal courts have consistently applied this standard to cases involving issues of general jurisdiction. As noted above, the Supreme Court of Alabama applied the settled standard derived from *International Shoe* and *Helicopteros* to the facts of this case. Pet. App. 8a-12a. In fact, virtually all of the courts in the cases cited by petitioner applied this very standard to the facts before them. *See, e.g., Kuenzle v. HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 455 (10th Cir. 1996); *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567-568 (2d Cir.), *cert. denied*, 117 S. Ct. 508 (1996); *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir.), *cert. denied*, 115 S. Ct. 322 (1994); *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 853 & n.3 (9th Cir. 1993); *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1199 (4th Cir. 1993); *Madara v. Hall*, 916 F.2d 1510, 1516 & n.7 (11th Cir. 1990); *Michigan Nat'l Bank v. Quality Dinette, Inc.*, 888 F.2d 462, 464-465 (6th Cir. 1989); *Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n*, 819 F.2d 434, 437 (3d Cir. 1987); *Glover v. Western Airlines, Inc.*, 745 P.2d 1365, 1367 (Alaska 1987); *Vons Cos. v. Seabest Foods, Inc.*, 926 P.2d 1085, 1091-1092 (Calif. 1996), *petition for cert. filed*, 65 U.S.L.W. 3756 (U.S. May 5, 1997) (No. 96-1762); *Thomason v. Chemical Bank*, 661 A.2d 595, 599 (Conn. 1995); *Maunder v. DeHavilland Aircraft of Canada, Ltd.*, 466 N.E.2d 217, 220-221 (Ill.), *cert. denied*, 469 U.S. 1036 (1984); *Goodyear Tire & Rubber Co. v. Ruby*, 540 A.2d 482, 487 (Md. 1988); *Price & Sons v. Second Judicial Dist. Court*, 831 P.2d 600, 601 (Nev. 1992) (discussing only *Helicopteros*); *Ultra Scientific, Inc. v. Yanusas*, 687 A.2d 1247, 1249 (R.I. 1997); *National Indus. Sand*

Ass'n v. Gibson, 897 S.W.2d 769, 772 (Tex. 1995).[1]

Out of this remarkable continuity among the lower federal courts and state courts, petitioner has struggled to find uncertainty and confusion by parsing the facts of each case and then deriving an interpretation of the holding that seems at odds with the approaches of other courts. If one looks to the cited cases, however, it is readily apparent that the differences identified by petitioner are not differences in standards or approaches, but rather reflect the inevitable variety that results when a single standard is applied to a plethora of factual situations. This Court has repeatedly recognized that the standards established to guide the constitutional analysis of jurisdictional issues are somewhat general by necessity and that each case must be assessed on its own facts. In *Kulko v. Superior Court of California*, 436 U.S. 84, 92 (1978), the Court made this point:

> Like any standard that requires a determination of "reasonableness," the "minimum contacts" test of *International Shoe* is not suspectible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present. *Hanson v. Denckla*, 357 U.S. 235, 246 (1958). ***We recognize that this determination is one in which few answers will be written "in black and white. The greys are dominant and even among them the shades are innumerable."*** *Estin v. Estin*, 334 U.S. 541, 545 (1948).

---

[1] Petitioner cited a number of cases in its petition that were decided prior to this Court's *Helicopteros* decision. While the probative value of those cases as support for alleged confusion among the lower federal courts and state courts is dubious, those cases consistently rely on the *International Shoe* standard in undertaking the general jurisdiction analysis. *See, e.g., Laufer v. Ostrow*, 434 N.E.2d 692, 694 (N.Y. 1982); *Crose v. Volkswagenwek Aktiengesellschaft*, 558 P.2d 764, 768 (Wash. 1977) (also relying on *Perkins*); *Markby v. St. Anthony Hosp. Sys.*, 647 P.2d 1068, 1071 (Wyo. 1982).

(Emphasis added); *accord International Shoe*, 326 U.S. at 319 (test "cannot simply be mechanical or quantitative"); *Perkins*, 342 U.S. at 445 ("The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case."). Petitioner apparently wants this Court to develop the type of mechanical or quantitative test for the general jurisdiction analysis that the Court has indicated is not possible to create. The Court should reject this request. The lower federal courts and state courts, including the Supreme Court of Alabama in this case, are faithfully applying the standard that the Court has previously developed to the fact-specific situations which they confront, so there is no need for further review by this Court. Just this Term, this Court denied another petition for writ of certiorari raising the same issue related to general jurisdiction, *see Metropolitan Life*, 117 S. Ct. at 508, and there certainly has been no change in the state of the law on that point in the few months since that denial.[2]

The suggestion by petitioner that the lower courts employ four separate approaches to deciding general jurisdiction cases has no basis in the case law. In placing various courts into one of its four groups, petitioner has engaged in an arbitrary reading of the cases which ignores the fact that the various courts are consistently applying the same standard. As an example, petitioner's primary basis for distinguishing between its "Alabama group"

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[2] The decision by the Supreme Court of Alabama in this case merely applied preexisting Alabama case law to the facts of this case, so there has been no change in Alabama law concerning the due process limits of general jurisdiction since the denial of certiorari in *Metropolitan Life*. *See* Pet. App. 11a-12a; *see also* Petition for Cert. at 14-15 & n.4 (describing Alabama case law on general jurisdiction and alleging reliance on that case law by the Supreme Court of Alabama in this case).

and "California group" of courts is an alleged requirement by the latter group that the defendant corporation or unincorporated association conduct "substantial" activities in the forum state in order for the exercise of general jurisdiction to be permissible. The problem with this contention is that a number of cases in the "Alabama group" use the term "substantial" as part of the analysis of the defendant's contacts with the forum state, *see Provident Nat'l Bank*, 819 F.2d at 437-438; *Ex Parte British Steel Corp.*, 426 So. 2d 409, 412 (Ala. 1983); *Administrators of Tulane Educ. Fund v. Cooley*, 462 So. 2d 696, 703 (Miss. 1984), *cert. denied*, 474 U.S. 820 (1985); *Glover*, 745 P.2d at 1368-1369; *Crose*, 558 P.2d at 766; *Hartley v. American Contract Bridge League*, 812 P.2d 109, 112 (Wash. Ct. App.), *review denied*, 820 P.2d 511 (Wash. 1991); whereas at least one of the cases in the "California group" fails to use the term as part of its analysis of the defendant's contacts, *see National Indus. Sand*, 897 S.W.2d 769. The conclusion to be drawn from this is that the talismanic significance that petitioner wishes to attribute to the term "substantial" is inappropriate. None of the "Alabama group" of courts holds, as petitioner suggests, that the nature, volume and extent of an entity's contacts with the forum state are irrelevant, and none of the "California group" suggests that the term "substantial" adds something meaningful to the requirement that contacts be "continuous and systematic."

Petitioner's suggestion that some courts go even further to require that substantiality be determined by looking to the proportion of the defendant's activities in the forum state as against its activities elsewhere is wrong. In each of the cases cited by petitioner in support of this proposition, the court in question looked to the proportion of the defendant entity's activities as one of many factors to be examined as part of the general jurisdiction analysis, but not one of those courts held or even suggested that this particular factor is controlling. *See, e.g., Nichols*, 991 F.2d at 1200; *Hughes v. A.H. Robins Co.*, 490 A.2d

1140, 1143 (D.C. 1985); *Goodyear*, 540 A.2d at 486-487; *Derman v. Wilair Servs., Inc.*, 590 A.2d 317, 324 (Pa. Super.), *appeal denied*, 600 A.2d 537 (Pa. 1991).

Petitioner's most surprising claim is its contention that the Second Circuit in *Metropolitan Life* has developed a "very different inquiry for determining the constitutionality of the exercise of general jurisdiction." Petition for Cert. at 23. In the *Metropolitan Life* opinion, the Second Circuit applied the very two-step approach to the general jurisdiction analysis employed by the Alabama Supreme Court in this case: first, the court must determine if the defendant entity has constitutionally sufficient contacts with the state, and, if so, then the *Asahi* factors must be examined to determine whether the exercise of jurisdiction is reasonable under the particular circumstances of the case. 84 F.3d at 567-568. Not only is this approach identical to the one employed by the Alabama court in this case, but the Second Circuit also indicated that its approach was consistent with that employed by the First, Fourth, Fifth, and Ninth Circuits. *Id.* at 569 & 573.

In sum, the decision by the Supreme Court of Alabama involves the factbound application of a settled constitutional standard. Like the Alabama court, lower federal courts and other state courts have consistently applied this settled standard to the particular factual situations confronted, and there is no conflict of authority which requires resolution by this Court.

II. There is an alternative basis for the Alabama courts to assert jurisdiction over petitioner, which renders pointless the requested review by the this Court.

Even if the Alabama courts could not exercise general jurisdiction over petitioner, the exercise of specific jurisdiction would still be appropriate. In opposing the motion to dismiss filed in the trial court by petitioner alleging the absence of *in*

personam jurisdiction over petitioner, BE&K argued that both general and specific jurisdiction exist in this case. BE&K identified three independent bases for specific jurisdiction: (1) petitioner had targeted its actions at BE&K, an Alabama resident, or, at the very least, should have known that its actions would have detrimental effects on BE&K and the citizens of Alabama, *see, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-473 (1985); (2) petitioner participated in a conspiracy against BE&K and at least one of the conspirators committed an overt act within or aimed at a citizen of Alabama, *see, e.g., Duke v. Young*, 496 So. 2d 37, 40 (Ala. 1986); and (3) petitioner had direct contacts with Alabama related to the claims in this case, *see, e.g., Brooks v. Inlow*, 453 So. 2d 349, 351 (Ala. 1984). Pltf.'s Brief in Opp. to Mot. to Dismiss at 26. Neither the trial court nor the Supreme Court of Alabama reached the question of the existence of specific jurisdiction. Thus, even if this Court were to grant the petition and rule in petitioner's favor on the merits, the exercise would be purely academic due to the existence of the separate basis for jurisdiction. To grant a petition for certiorari in such a circumstance would be a waste of this Court's limited resources.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

E. Mabry Rogers
Matthew H. Lembke*

BRADLEY ARANT ROSE &
WHITE LLP
2001 Park Place, Suite 1400
Birmingham, Alabama 35203
(205) 521-8000

Counsel for Respondent

*Counsel of Record

FILED
JUN 9 1997
OFFICE OF THE CLERK

No. 96-1447

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Petitioner,
v.
BE&K CONSTRUCTION COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

REPLY BRIEF FOR PETITIONER

JOHN T. DECARLO
DANIEL J. HALL
DECARLO, CONNOR & SELVO
500 South Virgil Avenue
Los Angeles, CA 90020

ANDREW D. ROTH
DAVID M. SILBERMAN
LAURENCE GOLD *
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONER

ARGUMENT

A. *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945), and its progeny, stake out a coherent and consistent body of "specific jurisdiction" Due Process Clause law to govern cases in which a legal entity—be it a corporation or an unincorporated association—is sued in a State to redress a wrong alleged to have been committed within that State.

The thesis of our *certiorari* petition is that, in contrast, fifty years after *International Shoe's* guarded suggestion that the Due Process Clause may allow for suits, like the instant one, on claims which arise wholly *outside* the forum State, the "general jurisdiction" law is incoherent and inconsistent.

International Shoe, as we showed, was itself a specific jurisdiction case which contains only a single paragraph of *dictum* addressing general jurisdiction. And, the only two successor general jurisdiction cases in this Court were decided in narrow, fact-specific terms.[1] As a result, this Court's precedents have not proved sufficient to guide the lower courts in making the threshold determination of when the assertion of general jurisdiction is constitutionally proper and how that determination is to be made. There is in consequence an ever-expanding line of state and federal appellate court decisions that quote the same words from *Perkins* or *Helicopteros* but that cannot be reconciled in their understanding of those words, in their rules of decision, or in their ultimate holdings. Pet. 7-25.

Respondent BE&K Construction Co. ("Respondent") sees the general jurisdiction world in a Panglossian way. This Court, says Respondent, did all that can be done to bring order by stating in *Helicopteros* that "[w]e thus must explore the nature of [the] contacts with the [forum]

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[1] *Helicopteros Nacionales de Columbia v. Hall,* 466 U.S. 408 (1984); *Perkins v. Benguet Mining Co.,* 342 U.S. 437 (1952).

State . . . to determine whether they constitute the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*." 466 U.S. at 415-16. Post-*Helicopteros,* there is, Respondent asserts, "remarkable continuity among the lower federal courts and state courts," in that the "state courts and lower federal courts have consistently applied this standard to cases involving issues of general jurisdiction." Resp. Br. at 5-6. The conflicting conclusions reached in the lower court cases, says Respondent, reflect nothing more than "the inevitable variety that results when a single standard is applied to a plethora of factual situations." Resp. Br. at 6. And, the decision below in the instant case—permitting the Alabama courts to exercise general jurisdiction over the United Brotherhood of Carpenters and Joiners of America ("Petitioner" or "the Union") essentially because the Union has a small number of affiliated organizations and members, as well as one employee, in Alabama—is, in Respondent's view, consistent with the Due Process Clause and with this "remarkabl[y] continu[ous]" body of lower court law. *Id.*[2]

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[2] Respondent does claim in this regard that there is more here by way of facts to support general jurisdiction than our *certiorari* petition acknowledges. Resp. Br. at 3. But the additional facts Respondent recites do not by an iota change the nature of this case or of the general jurisdiction issue presented.

Respondent notes first that in the year prior to the filing of this lawsuit, the Union paid $50,000 in funeral benefits on behalf of Alabama members; second, that the Union, through its one employee located in Alabama, has "directed and/or supported pro-union activities at Alabama jobsites" presumably in support of the Union's 2,584 Alabama members; and third, that the Union has "negotiated several labor agreements with Alabama employers" also presumably on behalf of its Alabama members. Resp. Br. at 3. But these limited activities within the State prove nothing more than that the Union provided some services in the State to its resident members which is precisely what would be expected of *any* national organization which has membership in a State.

Equally to the point, the record shows how small a part of the Union's overall operations its Alabama activities were. The $50,000 in death benefits paid out to the families of Alabama members, for

Respondent's argument fails on two separate grounds.

1. Respondent's brief rests on a most superficial—we would say trivial—test of, and proof for, consistency: general jurisdiction decisions that recite a " 'continuous and systematic' contacts with the forum State" standard are by definition consistent with the Due Process Clause and with each other; that being so, nothing else about the decisions—the factual context, the rationale, or the holding—is relevant to the consistency calculus. On this approach, Respondent makes 16 lower court cases consistent with the Alabama cases and with each other simply by citing to the page in the court opinions where the words "continuous and systematic" appear. Resp. Br. at 4-6.

That theory of consistency cannot survive a moment's more searching review of the cases.

- In *Ex parte Newco Mfg. Co.*, 481 So. 2d 867 (Ala. 1985)—the leading Alabama general jurisdiction decision and the decision on which the court below based its holding in the instant case—the Alabama Supreme Court held that the Due Process Clause permitted the Alabama courts to exercise general jurisdiction over a Missouri-based company which had engaged in an allegedly wrongful transaction in Maryland on the ground that the company in question sold between $65,000 and $85,000 worth of goods in Alabama each year through an independent distributor and the mails.

  In contrast, in *Nichols* v. *G.D. Searle & Co.*, 991 F.2d 1195 (4th Cir. 1993), to cite just one example, the Fourth Circuit held that general jurisdiction was constitutionally precluded even though G.D. Searle & Company employed between 17 and 21 representatives plus a resident manager within the forum State and had sales of between $9.0 and $13.0 million in that State.

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example, represents under 1% of the total death benefits paid by the Union in the year in question. And the 21 Alabama project agreements which the Union negotiated during the two years preceding the filing of this suit were a mere .37% of all such agreements entered into by the Union during that time period.

- In *Braband v. Beech Aircraft Corp.*, 72 Ill. 2d 548, 382 N.E. 2d 252 (1978), *reaffirmed in Maunder v. DeHavilland Aircraft,* 102 Ill. 2d 342, 466 N.E. 2d 217, 222 (1984), the Illinois Supreme Court asserted general jurisdiction over Beech Aircraft based on Beech's sales activity in Illinois through one independent distributor.

  Yet in *Bearry v. Beech Aircraft Corp.*, 818 F.2d 372 (5th Cir. 1987), the Fifth Circuit held that Texas could not constitutionally exercise general jurisdiction over Beech even though there were 17 independent dealers in Texas selling Beech's products and Beech made $250 million in Texas sales over a five-year period.

- In the instant case, the Alabama Supreme Court sustained general jurisdiction over the Union based upon the existence of ten affiliated local unions with approximately one half of one percent of the Union's members.

  Yet in *Lewron Television, Inc. v. International Alliance of Theatrical Stage Employees,* 378 A.2d 728 (Md. Ct. Spec. App. 1977), the court held that the national union in that case could not be sued in Maryland even though the union there had two locals in the State with approximately one half of one percent of the union's members.

By any measure—other than Respondent's tendentious one—these decisions are in conflict with each other. There simply is no room for doubt that the court that held general jurisdiction proper in *Ex parte Newco Mfg.* and in the instant case would likewise have exercised general jurisdiction over G.D. Searle and Beech Aircraft, and that, conversely, the courts that found a constitutional bar to general jurisdiction over those defendants would not have allowed general jurisdiction in *Newco* and in this case. And, it is equally plain that the Alabama Supreme Court would have found general jurisdiction to be proper over the national union in *Lewron,* whereas the *Lewron* court would not have allowed general jurisdiction here.

While Respondent blithely asserts that these results reflect nothing more than "a plethora of factual situations," Resp. Br. at 6, Respondent fails to identify even a single fact that is present here (or that was present in *Newco*) to justify the divergent results.

The short of the matter is that the rule of law requires courts to do more that merely recite a set of facts, state a legal standard, and then announce a result. Principled decisionmaking requires legal standards that are sufficiently particularized so as to assure that like cases will be decided alike. For that reason, this Court's role in constitutional adjudication has never ended—and could not end—with the formulation of wholly abstract constitutional standards, like "continuous and systematic contacts," that are susceptible to many meanings. Rather, the process of constitutional decisionmaking in this Court has continued through the elaboration of such standards in terms sufficiently concrete to guide the decision of individual cases. That is precisely what is needed with respect to the general jurisdiction law.

2. The chaos in the lower court general jurisdiction law is not just a matter of irreconcilable results. Rather, as we showed in the *certiorari* petition, those results, not surprisingly, reflect divergent understandings among the lower courts as to the governing rule of law. Pet. 13-25. Respondent's contrary contention does not withstand analysis.

(a) Respondent's starting point in constructing its consistency theory is that "[i]n *Helicopteros,* the Court indicated that the *International Shoe* benchmark would be satisfied in the general jurisdiction context when the defendant has 'continuous and systematic' contacts with the forum state." Resp. Br. at 4-5. That is, indeed, how some courts—including the Alabama Supreme Court—have read this Court's cases. But what *Helicopteros* actually says, in the very passage Respondent quotes, is quite different: "[w]e thus must explore the nature of [the] contacts with the State . . . to determine whether they constitute *the kind of continuous and systematic general*

business contacts the Court found to exist in Perkins." 466 U.S. at 415-16 (emphasis added).

Several courts, including most notably the Fifth Circuit and the Ninth Circuit, have focused on these words of limitation and have read *Helicopteros* to require not just "continuous and systematic contacts," but rather "continuous and systematic *general business contacts* . . . of the kind . . . found to exist in *Perkins.*" *See* Pet. 22-23. Indeed, the Ninth Circuit has expressly stated that it views the *Perkins* decision—the only decision in this Court upholding general jurisdiction—as "limited to [*Perkins*'] unusual facts," and the Ninth Circuit therefore "regularly ha[s] declined to find general jurisdiction even where the contacts were quite extensive." *Amoco Egypt Oil Co. v. Leonis Nav. Co.*, 1 F.3d 848, 851 n.3 (9th Cir. 1993).

Significantly, Respondent makes no attempt to do business with these cases or to harmonize the standard applied therein with the standard applied by the Alabama Supreme Court in this case. By its silence, then, Respondent tacitly concedes—as it must—the existence of a conflict over whether the general jurisdiction doctrine is limited to "the kind of continuous and systematic general business contacts the Court found to exist in *Perkins.*"

(b) Respondent focuses its fire on our claim that, even among those courts which read *Helicopteros* to establish a " 'continuous and systematic' . . . contacts" standard, there are disagreements as to what that standard means. Thus, for example, Respondent denies that some courts (including the Alabama Supreme Court) will uphold general jurisdiction based on any recurring—as opposed to sporadic—activities of the defendant in the forum State whereas other courts require extensive in-state activities to support general jurisdiction. "The problem with this contention," says Respondent, "is that a number of cases in the 'Alabama group' use the term 'substantial' as part of the analysis of the defendant's contacts with the forum state," whereas "at least one of the cases" cited in the *certiorari* petition as illustrating a more demanding standard "fails to use the term." Resp. Br. at 8.

But, of course, our point is *not* that it is proper to attach "talismanic significance," Resp. Br. at 8, to the word "substantial," *id.*, but rather to show that—regardless of the form of words used—there is a group of state courts which understand "continuous and systematic contacts" to encompass *any* recurring, in-state activity (including business activity involving as little as $2,000 a year in sales), whereas there is another group that looks at the *magnitude* of the in-state activity to determine the constitutionality of exercising general jurisdiction. And, the decisions, if looked at as more than mere citations, show just that.

Similarly, Respondent contends that our "suggestion that some courts go even further to require that substantiality be determined by looking to the proportion of the defendant's activities in the forum state as against its activities elsewhere is wrong." Resp. Br. at 8. According to Respondent, none of the cases we cited "even suggest[] that this particular factor is controlling." *Id.* Once again, Respondent's attempt to fix attention on abstract verbal formulations does nothing but mislead. The holdings of the courts denying general jurisdiction in cases involving in-state sales activity in the millions of dollars can only be understood, as the opinions show, as resting on the courts' stated recognition that the activity, while substantial in itself in some sense, is insubstantial in proportion to the defendant's overall activities.

(c) In a variation on the same theme, Respondent notes that the Alabama Supreme Court in this case, the Second Circuit in *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560 (2d Cir.), *cert. denied*, 117 S. Ct. 508 (1996), and other courts in other cases we cited, have embraced some form of a two-prong "sufficient contacts/reasonableness" test for general jurisdiction and that this similarity renders "most surprising" our contention that the Second Circuit has developed " 'a very different inquiry for determining the constitutionality of the exercise of general jurisdiction' " than the Alabama Su-

preme Court and the other courts of appeals. Resp. Br. at 9 (quoting Pet. 23).

Our contention is "surprising" only if all two-prong general jurisdiction tests are the same in terms or in substance. Of course, as the *certiorari* petition shows, those tests are *not* the same in either regard. No court, other than the Second Circuit, has suggested the combination of a "minimum contacts" threshold (with the burden of proof on the plaintiff) and a five "reasonableness" factor second prong (with the burden on the defendant to make a "compelling" unreasonableness case). *See* Pet. 23-25. And, as the Second Circuit recognized in constructing that novel test, "[t]he two leading Supreme Court cases"—*Perkins* and *Helicopteros*—provide only "a useful starting point for our analysis," 84 F.3d at 571, and the lower courts have embraced and applied "various approaches" in their ongoing effort to find their way past that starting point, *id.* at 572.[3]

B. We ended our Petition by stressing the importance of the question presented herein, both in practical and doctrinal terms. Pet. 25-29. When all is said and done, under the decision below and *Ex parte Newco Mfg.*—and the decisions of the numerous other state courts following the same approach—a corporation which does nothing more than make lawful sales in a State, or an unincorporated membership association which does nothing more than lawfully enroll members in the State, opens itself up

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[3] Respondent deems it significant here that *certiorari* was denied in *Metropolitan Life*. But even if, *arguendo*, the denial of *certiorari* in another case somehow could be deemed a relevant "precedent," we would note that: (1) in *Metropolitan Life* the Second Circuit concluded that general jurisdiction was not proper based upon the second prong of its two-prong test; and (2) the petition for *certiorari* was filed by the plaintiffs who, not surprisingly, did *not* raise before this Court the conflict among the lower courts on the threshold question of what contacts are sufficiently "continuous and systematic" to establish the constitutional predicate for general jurisdiction. Thus, it is simply not true, as Respondent here asserts, Resp. Br. at 7, that the *Metropolitan Life* petition raised the "same issue" as the instant petition.

to suit in the State with respect to claims arising against the corporation or membership organization anywhere in the world. And, that is true regardless of how limited the entity's activities are in the forum State, and how lawful those activities are and have always been.

For national corporations, and national membership associations, the upshot of the "Alabama group" rule is that such entities can always be sued by a putative plaintiff in the plaintiff's home State, or in any of the other 49 States in which a plaintiff finds the procedures or the climate advantageous, even where the plaintiff's injury occurred thousands of miles from the State in which suit is filed in some other jurisdiction in which the plaintiff voluntarily had chosen to do business. The instant case starkly illustrates the point, and starkly illustrates how far the Alabama group rule departs from the "traditional conception of fair play and substantial justice" which Due Process requires, *International Shoe*, 326 U.S. at 320.[4]

Respondent does not join issue with us in this regard, or endeavor to defend, in principle, the decision below.

Instead, Respondent closes by urging the Court to deny *certiorari* on the ground that, in Respondent's view, the Alabama Supreme Court could have rested its decision on the basis of specific jurisdiction. According to Respondent, "[n]either the trial court nor the Supreme Court of Alabama reached the question of the existence of specific jurisdiction" and therefore, Respondent claims, "[t]o grant a petition for certiorari in such a circumstance would be a waste of this Court's limited resources." Resp. Br. at 10. Respondent's premise and conclusion are equally flawed.

First, it is disingenuous for Respondent to state that the question of specific jurisdiction was not "reached"

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[4] Respondent chose to initiate this tort suit in Alabama even though the conduct giving rise to the suit had taken place in Minnesota, and had been the subject of extensive criminal, civil and administrative proceedings in Minnesota, including civil and administrative proceedings which Respondent itself had initiated in Minnesota.

below. This case began as a suit against five union defendants. Respondent's sole basis for asserting jurisdiction over three of the union defendants was *specific* jurisdiction, and it asserted *both* specific *and* general jurisdiction over the Petitioner herein.[5] The trial court dismissed the complaint against the three union defendants as to whom Respondent had claimed only specific jurisdiction, and sustained the complaint against the Petitioner *solely* on the ground of general jurisdiction. Thus, the fairest reading of its decision and order is that the trial court *rejected* Respondent's specific jurisdiction claim. And, while the Alabama Supreme Court did not discuss this issue, that is only because Respondent did not argue specific jurisdiction as an alternative basis for decision. Thus, it is far from clear that the specific jurisdiction issue is even open at this stage of the proceeding.

Second, and in any event, the fact of the matter is that the court below decided this case *solely* on general jurisdiction grounds. Thus, this case squarely and cleanly presents the general jurisdiction question stated in the *certiorari* petition in a manner that provides the Court every opportunity to clarify the governing law on this important and recurring constitutional question.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the petition for a writ of *certiorari* should be granted.

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[5] The fifth union defendant, the United Paperworkers International Union, did not assert a jurisdictional defense below but rather moved for dismissal on state law *forum non conveniens* grounds.

Respectfully submitted,

JOHN T. DECARLO
DANIEL J. HALL
DECARLO, CONNOR & SELVO
500 South Virgil Avenue
Los Angeles, CA 90020

ANDREW D. ROTH
DAVID M. SILBERMAN
LAURENCE GOLD *
BREDHOFF & KAISER, P.L.L.C.
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

* Counsel of Record